

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 967

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LEON SPENCER, APPELLANT

vs.

TEXAS

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APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

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## INDEX

	Original	Print
Record from the Criminal District Court of Jefferson County, Texas .....	A	1
Indictment .....	2	1
Stipulation .....	9	3
Defendant's motion No. I and order overruling same .....	11	4
Defendant's motion to quash indictment and order overruling same .....	17	6
Defendant's motion No. II and order overruling same .....	26	11
Defendant's special plea to the jurisdiction No. II and order overruling same .....	38	13

**Record from the Criminal District Court of Jefferson County, Texas—Continued**

Defendant's objections and exceptions to the Court's charge and order overruling same ....	52	16
Charge of the Court (excerpts) .....	62	20
Question by the jury and answer by the Court ..	72	22
Minute entry of verdict and judgment .....	77A	23
Statement of facts .....	94	25
Appearances .....	94	25
Colloquy between Court and counsel .....	95	25
Offers in evidence .....	99	28
Testimony of W. P. Hayes—direct .....	103	30
Testimony of H. C. Jackson—direct .....	108	32
—cross .....	111	33
State's Exhibits: .....	113	34
No. 1—Certified copy of verdict, judgment and sentence in Cause No. 17832 .....	113	34
No. 2—Certified copy of indictment in Cause No. 17832 .....	116	37
No. 3—Certified copy of record of Department of Corrections pertaining to Leon Spencer .....	119	39
No. 4—Copy of fingerprint card of Leon Spencer .....	126	46
Proceedings in the Court of Criminal Appeals of Texas .....	127	47
Opinion, McDonald, J. ....	127	47
Clerk's certificate as to judgment and overruling of appellant's motion for rehearing .....	131	50
Notice of appeal to the Supreme Court of the United States .....	132	51
Order granting motion for leave to proceed in forma pauperis .....	135	53
Order postponing jurisdiction .....	136	54



[fol. A]

**IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS**

No. 25040

**THE STATE OF TEXAS**

**vs.**

**LEON SPENCER**

[fol. 1] \* \* \*

[fol. 2]

**IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS**

**INDICTMENT—Returned and Filed February 6, 1964**

**THE GRAND JURORS** for the County of Jefferson, State aforesaid, duly organized as such at the January Term, A.D. 1964, of the Criminal District Court of Jefferson County, in said County and State, upon oath in said Court present that **LEON SPENCER** on or about the 7th day of January One Thousand Nine Hundred and Sixty-four, and anterior to the presentment of this indictment in the County of Jefferson and State of Texas, did then and there unlawfully with malice aforethought voluntarily kill Luvenia Irvine by shooting her with a gun;

**AND THE GRAND JURORS AFORESAID** do further present that prior to the commission of the aforesaid

offense by the said Leon Spencer, to-wit, on the 3rd day of April, 1951, in the Criminal District Court of Jefferson County, Texas, in Cause No. 17832, on the docket of said court, the said Leon Spencer was duly and legally convicted in said last named court of an offense to which the penalty of death is affixed as an alternate punishment, to-wit, Murder with Malice, upon an indictment then legally pending in said last named court and of which said court had jurisdiction; and said conviction was a final conviction and was a conviction for an offense committed by him, the said Leon Spencer, prior to the commission of the offense hereinbefore charged against him as set forth in the first paragraph hereof,

against the peace and dignity of the State.

/s/ W. B. Killebrew  
Foreman of the Grand Jury.

[fols. 3-8] \* \* \*

[fol. 9]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25040

[File Endorsement Omitted]

[Title Omitted]

STIPULATION—Filed July 24, 1964

It is stipulated by the Defendant, Leon Spencer, that he was on the 3rd day of April, 1951, convicted of the offense of murder with malice in Cause No. 17832 in the Criminal District Court of Jefferson County, Texas; that he is the same person convicted in said cause; that said conviction is final; that he actually spent time confined in the Texas Department of Corrections" in carrying out said conviction; that said conviction is of record in Volume 3-B, Page 364 of the Minutes of the Criminal District Court of Jefferson County, Texas; that such offense was committed prior to the date of the present offense on January 7, 1964; that said Court had jurisdiction of said offense and prior conviction, which conviction was and is valid.

This stipulation is intended as a judicial admission for the Court only, and not for presentation to the Jury.

Respectfully submitted,

MICHAEL D. MATHENY  
BILL WALTRIP

By /s/ Bill Waltrip  
Attorneys for Defendant

[fol. 10] . . .

[fol. 11]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25,040

[File Endorsement Omitted]

[Title Omitted]

DEFENDANT'S MOTION No. I—Filed July 24, 1964

COMES NOW the defendant, Leon Spencer, appearing in person herein and by and through his attorneys of record, and would respectfully show unto the Court the following:

That prior to the presentation of this motion, this defendant has filed a stipulation and judicial admission and confession that he is the same Leon Spencer that was duly convicted on the 3rd day of April, 1951, in the Criminal District Court of Jefferson County, Texas, in Cause No. 17,832 on the docket of said Court for the offense of murder with malice, an offense to which the penalty of death is affixed as an alternate punishment; the conviction of which was a final conviction and which was prior to the presentation of the indictment in this cause.

WHEREFORE, premises considered, this defendant would show unto the Court that there is no issue for the jury in this cause to pass upon that would require the State to introduce any evidence pertaining to any prior convictions on the part of this defendant without his first taking the witness stand, and would respectfully show unto the Court that the allegations contained in the indictment relating to a prior conviction of this defendant are mere allegations of a historical fact and do not constitute any offense and have been stipulated and are therefore matters that are not necessary for the jury to pass upon.

WHEREFORE, premises considered, this defendant respectfully requests this Honorable Court to enter an order requiring the prosecution to refrain from directly or indirectly introducing any evidence pertaining to any prior convictions of this defendant and further to instruct the prosecution to refrain from directly or indirectly questioning, or mentioning to any juror or prospective juror in this matter any prior conviction of this defendant, and further ordering the prosecution to instruct each witness to be used in this cause to refrain from directly or indirectly mentioning any prior convictions of this defendant. This defendant further respectfully requests the Court to enter an order instructing the District Attorney to refrain from reading any portions of the indictment in this matter which relate to any prior convictions of this defendant.

WHEREFORE, premises considered, defendant prays that this motion be granted in all respects.

Respectfully submitted,

/s/ Michael D. Matheny

/s/ Bill Waltrip  
Attorneys for Defendant

ORDER—July 24, 1964

ON THIS the 24th day of July, 1964, came on to be heard and considered the above motion of the defendant, and after being duly considered by the Court, is hereby overruled, to which action the defendant duly and timely excepted.

/s/ George D. Taylor  
Judge Presiding

[fols. 13-16] \* \* \*

[fol. 17]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25,040

[File Endorsement Omitted]

[Title Omitted]

DEFENDANT'S MOTION TO QUASH—Filed July 23, 1964  
TO SAID HONORABLE DISTRICT COURT:

NOW COMES Leon Spencer, defendant in the above entitled and numbered cause, and without waiving his previous motions filed herein, but insisting upon the same, here and now before entering any plea to the indictment herein, files this his Motion to Quash said indictment, and as grounds and as reasons therefor, respectfully represents and shows the Court as follows:

1.

That said indictment is defective, in that same does not charge the defendant with a violation of any penal law of this State for the reason that the offense attempted to be charged is that of murder with malice and repetition, there being no such criminal offense under the Texas Penal Code.

2.

Said indictment is not styled "The State of Texas" as provided by the Constitution of the State of Texas, Article 5, Section 12.

3.

This defendant excepts to the substance of the whole of the indictment herein because it does not show the date



of the presentment of the indictment by the Grand Jury, and same could be a date prior to the alleged offense charged to have been committed by the defendant.

4.

This defendant further objects and excepts to the whole of said indictment and particularly to the part therein which identified the deceased as "Luvenia Irvine," for the reason that there was no Luvenia Irvine, and the true and correct name of the deceased was Luvenia Spencer, the legal wife of the defendant.

[fol. 18]

5.

Defendant further objects and excepts to the whole of said indictment because it does not show that the Grand Jury returning said indictment was in session at the time said indictment was presented.

6.

This defendant further objects and excepts to the whole of said indictment, and particularly to that portion thereof which reads as follows:

"State of Texas vs. Leon Spencer (c) (j)"  
because same points out and informs the jury that defendant is a member of a minority race and was in jail and shows the disposition of the Grand Jury in returning this indictment, in that it points out that the defendant is of the colored race and was in jail, and said allegations single out this defendant as a member of a minority group.

7.

This defendant further objects and excepts to the whole of said indictment, because the enhancement provisions of said indictment do not show that the alleged prior conviction was subsequent in time to the alleged prior offense, and is therefore void.

## 8.

This defendant further objects and excepts to the whole of said indictment because this defendant was not served with a certified copy of said indictment under the terms and provisions of Article 487, Code of Criminal Procedure, and the Constitution of the State of Texas, Article 1, Section 10.

## 9.

This defendant further objects and excepts to the whole of said indictment because said indictment is duplicious, vague, indefinite, ambiguous, uncertain, and that from the fact thereof, it is impossible to ascertain just what offense, if any, is attempted to be charged against this defendant, for the reason that apparently this defendant is charged by indictment under the terms and provisions of Article 64 of the Texas Penal Code, which [fol. 19] provides for a special and increased punishment in the event an accused has previously been convicted of a felony offense where an alternate punishment of death is affixed; defendant would respectfully show unto the Court that said Article is unconstitutional and that it denies the accused of due process of law as guaranteed by the Constitution of the United States and the Constitution of the State of Texas in one or more of the following respects (but not limited to):

(a.) Said Article forces the defendant to testify against himself and allows the injection into evidence of prior felony convictions without the defendant first taking the witness stand to testify on his own behalf. Because of the construction of said Statute, it is impossible to erase the prior conviction from the jury's mind in connection with their determination of the guilt or innocence of the defendant in the instant case.

(b.) Said Article constitutes a cruel and unusual punishment under the terms and provisions of the United States Constitution, in that it in effect allows the State to prosecute the defendant again for a prior crime and puts the defendant in double jeopardy.

(c.) Said Article denies the defendant due process of law under the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States and makes it physically impossible for the defendant to have a fair trial in the instant case, and deprives this defendant of a fair and impartial hearing and thereby denies him due process of law.

(d.) Said Article is in direct conflict with Article 59 of the Texas Penal Code, which provides that increased punishments shall not apply to cases involving capital punishment.

(e.) Article 64 is unclear, vague, and ambiguous in its terms, in that it provides if

"A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life,"

for the reason that before any evidence of prior conviction under the terms and provisions of Article 64 can [fol. 20] be used against this defendant, it must be first shown that he is found guilty in the instant case of murder with malice, an offense to which the penalty of death is affixed as an alternate punishment; and under the accusation in this case, it would be possible for the jury to return a verdict of guilty of murder without malice, which does not carry an alternate punishment of death, and therefore would not allow the introduction of evidence of a prior conviction of a felony offense to which an alternate punishment would be death, and would therefore put before the jury evidence of the defendant's prior convictions without his first taking the witness stand and without such evidence being first admissible for enhancement purposes.

# 10.

This defendant objects and excepts to the whole of said indictment; and particularly to the second count thereof, which contains allegations of a prior conviction of this

defendant, because same is prejudicial to the rights of this defendant and should be stricken and not read to the jury prior to the time this defendant is convicted of the offense of murder with malice.

WHEREFORE, this defendant prays the Court to quash the whole of the indictment herein, and in the alternative, prays that the second count thereof be quashed.

Respectfully submitted,

BILL WALTRIP  
MICHAEL D. MATHENY

/s/ Michael D. Matheny  
Attorneys for Defendant

*[Duly sworn to by Michael D. Matheny jurat omitted in printing (all in italics)]*

[fol. 21] ORDER—July 24, 1964

ON THIS the 24 day of July, 1964, came on to be heard and considered the above Motion to Quash, and after being duly considered by the Court, is hereby overruled, except, Number 6 which is sustained, to which action the defendant duly and timely excepted.

/s/ George D. Taylor  
Judge Presiding

[fols. 22-25] . . .

[fol. 26]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25,040

[File Endorsement Omitted]

[Title Omitted]

DEFENDANT'S MOTION No. II—Filed July 23, 1964

COMES NOW the defendant, Leon Spencer, appearing in person herein and by and through his attorneys of record, and moves the Court to instruct the prosecution to refrain from attempting to introduce any evidence of any prior convictions of the said Leon Spencer prior to the returning of the jury in this cause of a verdict convicting the defendant, Leon Spencer, of murder with malice.

This defendant further moves the Court to instruct the prosecution to refrain from directly or indirectly questioning or mentioning to any juror or prospective juror in this matter any prior convictions of this defendant.

The said defendant further moves the Court to instruct the District Attorney's office to refrain from reading any portions of the indictment in this matter that refer to any prior convictions on the part of this defendant prior to the time that the jury has returned a verdict of guilty of murder with malice against the said Leon Spencer.

The defendant further moves the Court to require the District Attorney's office to instruct each and every witness to be used in the trial of this case to not refer, directly or indirectly, to any prior convictions of this defendant prior to the time that the jury has returned a verdict convicting this defendant of murder with malice.

This defendant would further show unto the Court that the allegations of prior conviction are mere allegations of a historical fact, and their introduction to the jury prior to the jury's deliberation on his guilt or innocence



in this cause would be so prejudicial to the rights of this defendant that it would deprive this defendant of a fair and impartial hearing in this matter and would thereby [fol. 27] deny him due process of law as guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

WHEREFORE, this defendant prays that this Honorable Court sustain this motion in all respects.

Respectfully submitted,

/s/ Michael D. Matheny

/s/ Bill Waltrip  
Attorneys for Defendant

ORDER—July 24, 1964

ON THIS the 24th day of July, 1964, came on to be heard and considered the above motion of the defendant, and after being duly considered by the Court, is hereby overruled, to which action the defendant duly and timely excepted.

/s/ George D. Taylor  
Judge Presiding

[fols. 28-37] \* \* \*



[fol. 38]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25,040

[File Endorsement Omitted]

[Title Omitted]

DEFENDANT'S SPECIAL PLEA TO THE JURISDICTION No. II  
—Filed July 23, 1964

COMES NOW the defendant, Leon Spencer, appearing in person herein and by and through his attorneys of record, and prior to his making any plea to the indictment on file herein, makes and files this his Special Plea to the Jurisdiction of this Court, and would respectfully show unto the Court the following:

1.

This defendant is charged by indictment under the terms and provisions of Article 64 of the Texas Penal Code, which provides for a special and increased punishment in the event an accused has previously been convicted of a felony offense where an alternate punishment of death is affixed; defendant would respectfully show unto the Court that said Article is unconstitutional and that it denies the accused of due process of law as guaranteed by the Constitution of the United States and the Constitution of the State of Texas in one or more of the following respects (but not limited to):

(1.) Said Article forces the defendant to testify against himself and allows the injection into evidence of prior felony convictions without the defendant first taking the witness stand to testify on his own behalf. Because of the construction of said Statute, it is impossible to erase the prior conviction from the jury's mind in

connection with their determination of the guilt or innocence of the defendant in the instant case.

(2.) Said Article constitutes a cruel and unusual punishment under the terms and provisions of the United States Constitution, in that it in effect allows the State to prosecute the defendant again for a prior crime and puts the defendant in double jeopardy.

[fol. 39] (3.) Said Article denies the defendant due process of law under the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States and makes it physically impossible for the defendant to have a fair trial in the instant case, and deprives this defendant of a fair and impartial hearing and thereby denies him due process of law.

(4.) Said Article is in direct conflict with Article 59 of the Texas Penal Code, which provides that increased punishments shall not apply to cases involving capital punishment.

(5.) Article 64 is unclear, vague, and ambiguous in its terms, in that it provides if

“A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life,”

for the reason that before any evidence of prior conviction under the terms and provisions of Article 64 can be used against this defendant, it must be first shown that he is found guilty in the instant case of murder with malice, an offense to which the penalty of death is affixed as an alternate punishment; and under the accusation in this case, it would be possible for the jury to return a verdict of guilty of murder without malice, which does not carry an alternate punishment of death, and therefore would not allow the introduction of evidence of a prior conviction of a felony offense to which an alternate punishment would be death, and would therefore put before the jury evidence of the defendant's prior convictions without his first taking the witness stand and

without such evidence being first admissible for enhancement purposes.

WHEREFORE, premises considered, defendant would respectfully show unto the Court that he is charged under a void and unconstitutional article, and therefore this Court does not have jurisdictional over this matter, and defendant therefore prays that this matter be dismissed, or that the enhancement provisions of this indictment [fol. 40] be stricken and that the defendant be tried only for the offense of murder.

Respectfully submitted,

BILL WALTRIP  
MICHAEL D. MATHENY

/s/ Michael D. Matheny  
Attorneys for Defendant

*[Duly sworn to by Michael D. Matheny jurat omitted in printing (all in italics)]*

ORDER—July 24, 1964

ON THIS the 24th day of July, 1964, came on to be heard and considered the above Plea to the Jurisdiction of the defendant, and after being duly considered by the Court, is hereby overruled, to which action the defendant duly and timely excepted.

/s/ George D. Taylor  
Judge Presiding

[fols. 41-51] \* \* \*

[fol. 52]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25040

[File Endorsement Omitted]

[Title Omitted]

DEFENDANT'S OBJECTIONS AND EXCEPTIONS TO THE  
COURT'S CHARGE—Filed August 1, 1964

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the defendant in the above styled and numbered cause and after all the evidence has been introduced and before arguments had begun and after both sides had finally rested and before the court's charge has been given, read, or delivered to the jury, and makes and files and presents to the court these his written objections to the court's charge:

1. Defendant objects to said charge in its entirety and more particularly to the portion thereof in which the deceased named Luvenia Irvine for the reason that the conclusive evidence adduced upon the trial of this cause shows that her legal name was Luvenia Spencer. Said defendant further objects for the reason that said connotation amounts to a comment on the weight of the evidence by the court and shows the jury that the court feels that this woman's name was Luvenia Irvine and not Luvenia Spencer.

2. Defendant objects and excepts to that portion of the charge wherein the court apprises the jury of the fact that this defendant has previously been convicted and/or charged of the offense of murder with malice without the defendant first taking the witness stand. Defendant excepts and objects to each and every allegation in said charge which refers to any evidence of any prior charge and/or conviction for each of the following reasons: (a)

said allegations deny this defendant due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States; (b) said allegations require the defendant to give evidence against himself; (c) said allegations injects into evidence before the jury [fol. 53] evidence of a prior conviction without the defendant having first taken the witness stand; (d) said allegations place defendant in jeopardy for his life twice for the same conviction for crime in violation of the Fifth Amendment of the Constitution of the United States; (e) said allegations deny defendant a fair and impartial trial under the Sixth Amendment of the Constitution of the United States for the reason that it advises the jury of prior misconduct of this defendant before they have determined his guilt or innocence of the primary charge; (f) said allegations inform the jury of matters that have been previously stipulated to the court and are therefore not properly before the jury for their determination, highly prejudicial to the rights of this defendant; (g) said allegations inform the jury that the amount of punishment assessed, if any, by the jury will not necessarily have to be complied with by the Texas Pardon and Parole Board and further advises them of the indeterminate sentence law in the State of Texas.

3. Defendant objects and excepts and points out to the court the absence of any instruction by the court that in the event they find the defendant guilty of murder with malice of the primary charge and further find that he is the same Leon Spencer who was previously convicted of an offense to which capital punishment is affixed as an alternate punishment that the minimum punishment to be assessed by the jury is life in the penitentiary and that the maximum that can be assessed is death without first instructing the jury that said prior conviction cannot be considered in any manner in assessing the defendant's punishment in the primary case of either life or death.

[fol. 54] 4. Defendant objects and points out to the court the absence of an instruction to the jury that if they believe the defendant is guilty of only murder without malice they will acquit him, for the reason that the



State of Texas has made an election to prosecute this defendant under the terms and provisions of Article 64 of the Texas Penal Code, which provides for punishment only in the event the defendant is convicted of murder with malice in the primary offense charged.

5. Defendant further objects to the instructions of the court regarding the punishment of death for the primary offense, or any offense, for the reason that the State has elected to prosecute this defendant under the terms and provisions of Article 64 of the Texas Penal Code, which is ambiguous, and uncertain in its terms for the reason that said Article does not include within its terms and provisions the assessment of death as a punishment for its violation.

6. Defendant further objects to the proposed verdict in the court's charge for the reason that it contains two possible verdicts inflicting the death penalty upon this defendant and is therefore highly prejudicial and misleading to the jury and amounts to a comment on the evidence by the court and indirectly implies to the jury the court's opinion of the penalty which should be inflicted upon this defendant.

[fol. 55] 7. Defendant objects and excepts to that portion of the court's charge wherein it is stated by the court that they must believe beyond a reasonable doubt that the defendant has heretofore been convicted of murder with malice in order to come within the terms and provisions of Article 64 of the Texas Penal Code for the reason that said instruction does not also require that they must also believe beyond a reasonable doubt that the defendant is the same person who has heretofore been convicted of murder with malice.

[fol. 56] 8. Defendant objects and excepts to the court's charge wherein it allows the jury to assess any punishment whatever under Article 64 of the Texas Penal Code for the reason such is not a proper determination for the jury since any conviction any punishment assessed less than death would automatically become life imprisonment, it being stated to the court that the ordinary range of punishment for murder should be submitted to the



jury for their determination upon the facts and circumstances of the case, the subject of repetition being strictly a matter of law for the court.

Respectfully submitted,

MICHAEL D. MATHENY and  
BILL WALTRIP

By:

/s/ Michael D. Matheny  
Attorneys for Defendant

[fol. 57] The above and foregoing objections were made, filed, and presented to the court after all evidence had been introduced and after both the State and the Defendant had rested and before argument had begun, before the court's charge had been given, read or delivered to the jury, and at the time and in the manner prescribed by law, and the court after having read and considered said objections overruled each and all of said objections to which action and ruling of the court the defendant then and there seasonably in open court and at the time and in the manner prescribed by law duly excepted.

/s/ George D. Taylor  
Judge Presiding

[fols. 58-61] \* \* \*

[fol. 62]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

JULY 1964 TERM

No. 25040

[File Endorsement Omitted]

[Title Omitted]

CHARGE OF THE COURT—Filed August 1, 1964

LADIES AND GENTLEMEN OF THE JURY:

• • • • •

[fols. 63-64] • • •

[fol. 65] Our law further provides that a person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary.

Bearing in mind the foregoing instructions, if you find and believe from the evidence beyond a reasonable doubt that the defendant did in Jefferson County, Texas, on or about the 7th day of January, 1964, with malice aforethought, did voluntarily kill the said Luvenia Irvine by shooting her with a gun; and if you further find and believe from the evidence beyond a reasonable doubt that on the 3rd day of April, 1951, the defendant was tried and convicted in the Criminal District Court of Jefferson County, Texas, in Cause No. 17832, on the docket of said court, for the offense of murder with malice, and that said conviction was a final conviction, you will find the defendant guilty as charged in the indictment and assess his punishment at death or confinement in the penitentiary for life.

You are instructed that even though you should find and believe from the evidence beyond a reasonable doubt that the defendant had heretofore been convicted of murder with malice, on the 3rd day of April, 1951, you will not consider that fact as any evidence of the defendant's guilt or innocence of the murder with malice of Luvenia Irvine on or about the 7th day of January, 1964, as alleged in the indictment.

\* \* \*

[fols. 66-71] \* \* \*

[fol. 72]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

[File Endorsement Omitted]

QUESTION BY THE JURY—Filed August 1, 1964

Judge.

Will the defendant be eligible for parole during a life sentence. If so, after how many years?

/s/ Arnold  
Foreman

ANSWER BY THE COURT TO THE JURY

To the Jury:

This is not a matter for the jury's consideration, and the jury will be guided by the charge.

/s/ George D. Taylor  
Judge Presiding

[fols. 73-76] \* \* \*

[fol. 77A]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25040

[Title Omitted]

Indicted for MURDER WITH MALICE AND REPITI-  
TION

MINUTE ENTRY OF VERDICT AND JUDGMENT—  
August 1, 1964

THIS DAY this cause was called for trial, and the State appeared by her District Attorney, and the Defendant LEON SPENCER appeared in person and by Counsel, and both parties announced ready for trial; and the Defendant in open Court pleaded not guilty to the charge contained in the Indictment herein; and thereupon a jury, to-wit:

J. S. Arnold, and eleven others, was duly selected, empaneled and sworn, according to law, who, having heard the indictment read, and the defendant's plea of not guilty thereto; and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer, the Defendant being present, and in due form of law returned into open Court the following verdict, which was received by the Court, and is here now entered upon the minutes of this Court, to-wit: "We, the jury, find the defendant guilty of murder with malice as charged in the indictment and find that he has previously been convicted of murder with malice as charged in the indictment and assess his punishment at death.

J. S. ARNOLD, Foreman."

It is, therefore, considered and adjudged by the Court that the Defendant Leon Spencer is guilty of the offense of Murder with Malice and Repetition as found by the jury, and that he be punished, as has been determined, by DEATH, and that the State of Texas do have and recover of said Defendant LEON SPENCER all costs in the prosecution expended, for which execution will issue, and that said Defendant be remanded to jail to await the further order of this Court herein.

GEORGE D. TAYLOR, JUDGE.

[fols. 78-92] . . .

[fol. 93] [File Endorsement Omitted]



[fol. 94]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25,040

THE STATE OF TEXAS

VS.

LEON SPENCER

STATEMENT OF FACTS—JULY 30, 1964

BE IT REMEMBERED, that the above entitled and numbered cause came on for trial in its regular turn on the docket of the Criminal District Court of Jefferson County, Texas, on the 30th day of July, 1964, the same being a regular term day of the regular July 1964 Term of said Court, before the Honorable George D. Taylor, Judge Presiding, beginning at 3:38 o'clock a.m. of said day, and continuing thereafter until completed, when the following proceedings were had and the following evidence adduced, to-wit:

APPEARANCES:

W. C. Lindsey; Jim Vollers of the Office of the District Attorney, Jefferson County, Texas; counsel for the State of Texas

Mike Matheny; Bill Waltrip, Counsel appointed by court for defendant

[fol. 95] THE COURT: The defendant will stand and the State will read the indictment.

(At this point the indictment was read in open court by counsel for the State of Texas:)

COLLOQUY BETWEEN COURT AND COUNSEL

MR. WALTRIP: If the court please, prior to the entry of any plea, we have objections and a motion we

would like to state to the court and we ask, apologetically, could we have the jury retired just momentarily?

THE COURT: (To Bailiff) Take the jury out.

(At this point the following proceedings were had out of the presence of the jury, to-wit:)

MR. WALTRIP: If it please the court, the defendant, Leon Spencer, objects and excepts to the reading of the second paragraph of the indictment wherein it is alleged that he has heretofore been convicted of a felony, to-wit: murder with malice, for the following reasons: Notifying and allowing the jury to know and to learn of such prior conviction is an absolute denial of due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States and, two, giving the jury such information, whether by reading it or by proving it, requires the defendant to give evidence and testify against himself in this criminal proceeding; and, three, this action and this reading of this portion of the indictment injects into evidence before the jury, evidence [fol. 96] of an extraneous and unrelated offense; four, injection of evidence before the jury of a prior conviction without the defendant having first voluntarily taken the witness stand in his defense; five, notifying the jury and allowing them to know of this prior conviction, places this defendant, Leon Spencer, in jeopardy of his life twice for the same offense; six, we further object to it because this evidence is not only highly prejudicial, but highly prejudicial in that this fact has already been judicially confessed before the court by written stipulation on July 24, 1964, and it is therefore not a controverted fact for submission to the jury or for any further determination or purpose; seven, allowing the jury to know and understand that this defendant has been convicted heretofore of a felony informs the jury of our indeterminate sentence law, our parole laws, and informs them that whatever punishment they may assess may not necessarily be complied with in point of time. By that I mean, evidence of this prior conviction in 1951 of fifteen years imprisonment clearly shows, this being 1964, that the entire fifteen years was not served. Eight, placing

this prior conviction before the jury is an absolute denial of a fair and impartial trial by jury guaranteed by the Sixth Amendment of the Constitution of the United [fol. 97] States. For each and all of these objections we respectfully move the court to instruct the jury they are not to consider the reading of the second paragraph of the indictment having to do with the prior conviction of murder for any purpose. May I have a ruling on this motion?

THE COURT: Does the State desire to argue the matter?

MR. LINDSEY: No, Your Honor, we feel it is merely a reiteration once again of the same matter that has been argued on pretrial.

THE COURT: The objection, which incidentally, was made after the reading of the indictment, on the merits is overruled, and the request for specific instruction to the jury is denied.

MR. WALTRIP: We take exception. Note our exception to both such rulings. We have a further motion; for each and all the foregoing reasons we respectfully move the court to grant a mistrial.

THE COURT: Denied.

MR. WALTRIP: Note our exception. Your Honor, may I have a running bill, if the court please, to any and all testimony regarding this prior offense. By that, I mean, the introduction of all or part of it, or the mention of it by any witness, mention of it by the prosecutor, without the necessity of having to make the same ob-[fol. 98] jections I have just made. In other words, our intention is, each and every time of all or part of this prior offense is brought up we will have the same identical seven or eight objections that I have just stated to the court. May we have a running bill of exceptions throughout the testimony of this trial to statements by the prosecutors in evidence or in the jury argument, without the necessity of my having to each time make the same objections; that is, to any evidence with reference to the prior offense or any questions of similar or like import.

MR. VOLLERS: May I state to the court, Your Honor; of course, we do not waive our right to question the record.

THE COURT: You may have such a bill insofar as it relates to the motion which you have just made and in the light of the court's action in respect to it.

MR. WALTRIP: In other words, our intention is that the bare mention of all or part of anything having anything to do with the prior proceedings, convictions, sentence or the like, of any prior offense, we will not have to object. We now state to the court that our objections will be the same as they were momentarily moments ago. So, do we understand each other, that I might have a running bill as to all matters involving a prior offense [fol. 99] which might be brought up at this trial whether in evidence or in the jury argument?

THE COURT: You may have the running bill which would show your objection to all such possible testimony but it will not affect the record in the case as it may be developed.

MR. WALTRIP: All right.

THE COURT: The defendant will stand. Now, you are Leon Spencer?

DEFENDANT: Yes, sir.

THE COURT: Leon, are you the same Leon Spencer who is named as the defendant in this case?

THE DEFENDANT: I am.

THE COURT: The indictment in which has just been read to you?

DEFENDANT: I am.

THE COURT: How do you plead, guilty or not guilty?

MR. MATHENY: Not guilty.

THE COURT: (To Clerk) Enter a plea of not guilty.

#### OFFERS IN EVIDENCE

MR. VOLLERS: Your Honor, first of all, we offer in evidence certified copies of the judgment and sentence in Cause 17832, styled, The State of Texas vs Leon Spencer.

MR. MATHENY: We object to it for the reasons already stated and further on the ground that there is no fact issue for the jury to determine.

THE COURT: Overruled.



[fol. 100] MR. MATHENY: Note our exception.

MR. VOLLERS: It is my understanding, Your Honor, that the ruling of the court is that the exhibit is admitted in evidence as State's Exhibit Number One?

THE COURT: Yes, the exhibit is admitted in evidence.

(Whereupon, the instrument tendered by counsel for the State of Texas was received in evidence by the Court, marked for identification by the reporter as "State's Exhibit Number One," and is in a separate sealed envelope marked "Volume Two," and constitutes a part of this Statement of Facts:)

MR. VOLLERS: As State's Exhibit Number Two I offer a certified copy of the indictment returned in Cause Number 17832, entitled, The State of Texas vs Leon Spencer.

MR. MATHENY: We object to that for the same reason.

THE COURT: Exhibit Two is admitted. Objection overruled.

MR. MATHENY: Note our exception.

(Whereupon, the instrument tendered by counsel for the State of Texas, was received in evidence by the court, marked for identification by the reporter as "State's Exhibit Number Two," and is in a separate sealed envelope marked "Volume Two," and constitutes a part of this Statement of Facts:)

[fol. 101] MR. VOLLERS: As State's Exhibit Number Three, Your Honor, we offer the portions of the records from the office of Mr. J. C. Roberts, Record Clerk, Texas Department of Corrections.

MR. WALTRIP: We would have the same objections we made earlier and we do have a running bill of exceptions as to all of this?

THE COURT: That is right. Instrument is admitted.

(Whereupon, the instrument tendered by counsel for the State of Texas was received in evidence by the Court, marked for identification by the reporter as

"State Exhibit Number Three," and is in a separate sealed envelope marked "Volume Two," and constitutes a part of this Statement of Facts:)

MR. VOLLERS: As our first witness, Your Honor, I would like to call Mr. Mike Curnan.

MR. WALTRIP: The Rule is in effect, I presume, Your Honor?

THE COURT: The Rule has been invoked.

\* \* \*

[fol. 102] (Whereupon, W. P. "PAT" HAYES, called as a witness for the State of Texas, after having first been duly sworn upon his oath, testified as follows, to-wit:)

[fol. 103] DIRECT EXAMINATION

BY MR. VOLLERS:

\* \* \*

[fol. 104] Q. All right. Now, is this a rule which you have developed in your practice or who has established this rule?

A. This rule has been established through a period of some sixty years or more, beginning with the work in developing the Henry System of Identification in about 1890.

Q. Now, did you compare the characteristics between these two sets of prints which I have asked you about?

A. I have.

Q. And have you found at least twelve similarities between the two prints?

A. I have twelve similarities in each fingerprint, or in all ten fingerprints. Each individual finger has twelve or more similarities.

Q. Now, as I understand from what you have said, Mr. Hayes, a positive identification is possible where there are nine to twelve similarities on one finger, is that correct?

A. Yes, sir.

Q. Has there ever been any exception found to this rule?



A. Not that I know of.

Q. Now, Mr. Hayes, where were you employed on April 3, 1951?

A. I was employed by the Police Department of the City [fol. 105] of Beaumont, Texas.

Q. I will ask you whether or not you know the defendant in this case, Leon Spencer?

A. Yes, sir, I know Leon Spencer.

Q. Did you have occasion to be present in the Criminal District Court of Jefferson County, Texas, on April 3, 1951?

A. I did.

Q. And who was tried on that date?

A. This defendant that is here today, Leon Spencer.

Q. Do you recognize him? Do you remember him from that time?

A. I do.

Q. Did you participate in that case?

A. I testified on the trial of the case, yes, sir.

Q. On that date, Mr. Hayes, what was the result of that trial?

A. He was found guilty and sentenced to serve the term of fifteen years.

Q. Now, for the purpose of clarification, Mr. Hayes—

MR. WALTRIP: Excuse me, counsel. If the Court please, we again urge our same objections. So that we understand each other, our running bill applies to this testimony having something to do with some prior offense.

THE COURT: I understand.

MR. WALTRIP: Thank you, sir.

[fol. 106] Q. Mr. Hayes, for the purpose of clarification to the jury, I show you State's Exhibit Number Three. Would you explain to the jury what these records are? State where those records came from.

A. These are records that come from the Texas Department of Corrections. The first page is the certification. The second page of the record—this is the sentence and the judgment in the State versus Leon Spencer, Cause Number 17832, dated April 3, 1951, on indictment for murder.

Q. Without going through these page by page, let me ask you this, Mr. Hayes; you are familiar with this type of record, are you not?

A. Yes, sir.

Q. Are these copies of records which are kept in the due course of business by the custodian of records—

MR. MATHENY: Your Honor, we object to that. There is no way in the world a man who works for the District Attorney's Office can tell whether or not those are kept by a clerk in Huntsville, Texas, or somewhere else.

THE COURT: The witness can testify only of his personal knowledge.

Q. Do you know Mr. J. C. Roberts?

A. Yes, sir.

Q. Is he the Custodian of the Records of the Texas Department of Corrections at Huntsville?

[fol. 107] A. He is.

\* \* \* \*

[fol. 108] (Whereupon, H. C. JACKSON, called as a witness by the State of Texas, after having first been duly sworn upon his oath, testified as follows, to-wit:)

### DIRECT EXAMINATION

BY MR. VOLLERS:

\* \* \* \*

[fol. 109] Q. I will show you here (exhibiting)—do these appear to be the shells and shell cases which you unloaded from the gun?

[fol. 110] A. Yes, sir, they do.

Q. I believe you said that Mr. Geisendorff marked these also?

A. Yes, sir he made a mark on them.

Q. I will ask you whether or not that on or about April 3, 1951, you were employed by the Beaumont Police Department?

A. Yes, sir.

Q. And on that date did you have occasion to be in this courtroom?

A. Yes, sir, I did.

Q. And do you remember who, if anyone, was on trial at that time?

A. Yes, sir, Leon Spencer.

MR. WALTRIPP: If the court please, we still urge our same objection and I assume our running bill is still in effect as to those objections we made yesterday?

THE COURT: That is correct.

MR. WALTRIP: Thank you.

Q. Were you present here in the courtroom during that trial?

A. Yes, sir.

Q. Do you recall—do you specifically remember that it was the same man that was on trial then?

A. Yes, sir.

[fol. 111] Q. What was he being tried for?

A. Tried for murder.

Q. Was he convicted?

A. Yes, sir.

Q. As a result of the trial?

A. Yes, sir, as a result of the trial he was convicted.

Q. Was he convicted of the offense of murder with malice?

A. Yes, sir.

MR. VOLLERS: No further questions.

## CROSS-EXAMINATION

BY MR. MATHENY:

Q. Mr. Jackson, did you personally make any scratches or markings on the pistol right there?

A. Yes, sir, on the gun I did.

Q. Whereabouts?

A. It is just below the cylinder on the main frame.

Q. Mr. Geisendorff also made a mark?

A. Yes, sir, he did, he marked it.

Q. Where was Leon Spencer when you were making these marks?

A. He was sitting just back of me there drinking a cup of coffee.

Q. The shells, did you personally make markings on the shells?

[fol. 112] - A. No, sir, I didn't mark the shells.

\* \* \* \*

[fol. 113]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

State's Exhibit No. 1

MINUTES CRIMINAL DISTRICT COURT,  
JEFFERSON COUNTY, TEXAS  
TERM, A.D. 19

PLEA GUILTY

BE IT REMEMBERED, That on Monday, the  
day of 19 , these came on and was  
held a regular term of the Honorable District Court of  
Jefferson County, Texas, at the Court House thereof, at  
Beaumont, Texas.

Present and presiding: Hon.  
Judge, Criminal District Court of Jefferson County;  
County Attorney;  
District Clerk, and  
Sheriff.

No. 17832

April 3, 1951

THE STATE OF TEXAS

vs.

LEON SPENCER

Indicted for Murder

THIS DAY this cause was called for trial, and the  
State appeared by her DISTRICT Attorney, and the De-

fendant Leon Spencer appeared in person and by Counsel, and both parties announced ready for trial; and the Defendant Leon Spencer in open Court pleaded guilty to the charge contained in the Indictment herein. And thereupon the Defendant Leon Spencer was admonished by the Court of the consequences of his said plea, and said Defendant persisted in pleading guilty, and it plainly appearing to the Court that said Defendant is same, and is uninfluenced in making said plea by any consideration of fear, or any persuasion or any delusive hope of pardon prompting him to confess his guilt, the said plea of guilty is by the Court received and entered of record as the plea of said Defendant herein; thereupon a jury, to-wit: A. B. Swanzy and eleven others, was duly selected, impaneled and sworn, according to law, who, having heard the indictment read, and the Defendant's plea of guilty thereto; and having heard the evidence submitted and having been duly charged by the Court, retired in charge of the proper officer, the Defendant being present, and in due form of law returned into open Court the following verdict, which was received by the Court, and is here now entered upon the minutes of this Court, to-wit:

We, the jury, find the defendant guilty of Murder, as charged in the indictment, and assess his punishment at confinement in the penitentiary for a term of 15 years.

A. B. SWANZY  
Foreman

It is, therefore, considered and adjudged by the Court that the Defendant Leon Spencer is guilty of the offense of Murder as found by the jury, and that he be punished, as has been determined, by confinement in the State penitentiary for a term of 15 years, and that the State of Texas do have and recover of said Defendant Leon Spencer all costs in the prosecution expended, for which execution will issue, and that said Defendant be remanded to jail to await the further order of this court herein.

OWEN M. LORD, JUDGE.

[fol. 114]

No. 17832

April 3, 1951

THE STATE OF TEXAS

vs.

LEON SPENCER

THIS DAY this cause being again called; the State appeared by her District Attorney and the Defendant Leon Spencer was brought into open Court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him on this same day of this term.

And thereupon the Defendant Leon Spencer was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant Leon Spencer to pronounce sentence against him as follows, to-wit: "It is the order of the Court that the Defendant Leon Spencer who has been adjudged to be guilty of Murder whose punishment has been assessed by the verdict of the jury at confinement in the State penitentiary for a term of 15 years, to be delivered by the Sheriff of Jefferson County, Texas, immediately to the superintendent of the penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and said Leon Spencer shall be confined in said penitentiary for a term of not less than 2 (two) years nor more than 15 (Fifteen) years in accordance with the provisions of the law governing the penitentiaries of said State."

And the said Leon Spencer is remanded to jail until said Sheriff can obey the directions of this sentence. It further appearing to the Court that this defendant has



been confined of his liberty in the Jefferson County Jail at Beaumont, Texas for a period of One Hundred and Sixty-Five (165) days, It is the further Order of the Court that he be allowed credit for this time on this Sentence.

OWEN M. LORD, Judge Presiding.

[fol. 115] \* \* \*

[fol. 116]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

State's Exhibit No. 2

In the Name and by the Authority of the State of Texas:

THE GRAND JURORS for the County of Jefferson, State aforesaid, duly organized as such at the OCTOBER Term, A.D. 1950, of the Criminal District Court of Jefferson County, in said County and State, upon oath in said Court present that Leon Spencer on or about the 19th day of October One Thousand Nine Hundred and Fifty, and anterior to the presentment of this indictment in the County of Jefferson and State of Texas, did then and there unlawfully, voluntarily, and with malice aforethought, kill Annie Bell Spencer, by then and there striking, stabbing, and cutting the said Annie Bell Spencer with a knife,

against the peace and dignity of the State.

/s/ Illegible

[fol. 117]

File No. 17832

THE STATE OF TEXAS

vs.

LEON SPENCER

OFFENSE

MURDER

A TRUE BILL

/s/ Illegible

Foreman of the Grand Jury.

Filed the

day of

, 19

Clerk of the District Court,  
Jefferson County, Texas.

By /s/ Illegible, Deputy

Amount of Bail, \$.....

## NAME OF WITNESSES

Willie Tolbert, 633 Forsythe, Beaumont  
 T. A. Floyd, 706 Ave. E  
 Mrs. Lena Kattawan, 1347 Railroad Ave.  
 N. M. Campise, 2610 Railroad or 660 W. Pipkin  
 Mrs. N. M. Campise, 2610 Railroad or 660 W. Pipkin  
 Martin DeMary, 6155 Garner Road  
 James Spencer, 935 Sherman  
 Beatrice Wilson, 350 Jefferson Alley  
 Elbert Mayfield, Willard Undertaking Co.  
 Frank Englon, 596 McGovern  
 Pat Hayes, City Officer  
 Dr. F. W. Sutton  
 L. M. Hamm, City Officer  
 H. C. Jackson, City Officer  
 Inez Landry, 1000 Blk, Sherman  
 Fred Jones,  
 Jessie Wallace  
 Elsie Clinton,

[fol. 118] \* \* \*

[fol. 119]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

State's Exhibit No. 3

U.S. Rev. Statutes, Sec. 906. Attestation by Custodian,  
Certificate of Presiding Judge, Certificate of Clerk to  
official character of Judge.

THE STATE OF TEXAS     )  
COUNTY OF WALKER     )

I, J. C. ROBERTS, HEREBY CERTIFY THAT I AM  
THE Record Clerk of the Texas Department of Cor-  
rections, a penal institution of the State of Texas, situ-  
ated in the County and State aforesaid. That in my legal  
Custody as such officer are the original files and records  
of persons heretofore committed to said institution: that  
the (X) photograph (X) fingerprints and (X) commit-  
ments attached hereto are copies of the original records of  
LEON SPENCER, No. 119454 a person heretofore com-  
mitted to said penal institution and who served a term  
of imprisonment therein: that I have compared the at-  
tached copies with their respective originals now on file  
in my office and each thereof contains, and is a full, true,  
and correct transcript and copy from its said original.

IN WITNESS WHEREOF, I have hereunto set my  
hand seal this 15th day of July, 1964.

/s/ J. C. Roberts, Record Clerk

THE STATE OF TEXAS     )  
COUNTY OF WALKER     )

I, AMOS A. GATES PRESIDING JUDGE OF THE COUNTY COURT, do hereby Certify that J. C. ROBERTS, whose name is subscribed to the above Certificate, was at the date thereof, and is now Record Clerk of the Texas Department of Corrections, and is the legal keeper and the officer having the legal custody of the original records of the said Texas Department of Corrections: that the said Certificate is in due form and that the signature subscribed thereto is his genuine signature.

IN WITNESS WHEREOF, I have hereunto subscribed my name in my official character as such Judge, in the County and State aforesaid, this the 15th day of July, 1964.

/s/ Amos A. Gates, JUDGE  
of the County Court, Walker County, Texas

THE STATE OF TEXAS     )  
COUNTY OF WALKER     )

I, J. L. FERGUSON CLERK OF THE COUNTY COURT of the County of Walker, State of Texas, which Court is a court of records having a seal which is annexed hereto, do certify that AMOS A. GATES whose name is subscribed to the foregoing Certificate of the due Attestation, was at the aforesaid subscribing, the same Judge of the County Court aforesaid, and was duly commissioned, qualified and authorized by LAW to execute the said Certificate, and I do further certify that the signature of the above named Judge of the said Certificate of due Attestation is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and annexed the seal of the County Court at my office in said County, this the 15th day of July, 1964.

/s/ J. L. Ferguson, CLERK  
County Court, Walker County, Texas



[fol. 121]

No. 17832

THE STATE OF TEXAS

vs.

LEON SPENCER

April 3, 1951

## INDICTED FOR MURDER

This day this cause was called for trial, and the State appeared by her District Attorney, and the Defendant Leon Spencer in person and by counsel and both parties announced ready for trial and the Defendant Leon Spencer in open court pleaded guilty to the charge contained in the indictment herein. And thereupon the Defendant Leon Spencer was admonished by the court of the consequences of his said plea, and said Defendant persisted in pleading guilty, and it plainly appearing to the court that said Defendant is sane, and is uninfluenced in making said plea by any consideration of fear, or any persuasion of any delusive hope of pardon prompting him to confess his guilt, the said plea of guilty is by the court received and entered of record as the plea of said Defendant herein; thereupon a jury to-wit: A. B. Swanzy and eleven others was duly selected, impaneled and sworn, according to law, who having heard the indictment read, and the Defendant's plea of guilty thereto; and having heard the evidence submitted and having been duly charged by the court, retired in charge of the proper officer, the Defendant being present, and in due form of law returned into open court the following verdict, which was received by the court, and is here now entered upon the minutes of this court, to-wit:

We, the jury, find the defendant guilty of Murder, as charged in the Indictment, and assess his punishment at confinement in the penitentiary for a term of 15 years.

A. B. SWANZY  
Foreman



It is, therefore, considered and adjudged by the court that the Defendant Leon Spencer is guilty of the offense of Murder as found by the jury, and that he be punished as has been determined, by confinement in the State Penitentiary for a term of 15 years, and the the State of Texas do have and recover of said Defendant Leon Spencer all costs in the prosecution expended, for which execution will issue, and that said Defendant be remanded to jail to await the further order of this Court herein.

[fol. 122] \* \* \*

[fol. 123]

IN THE DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS  
APRIL TERM, 1951

No. 17832

April 3, 1951

THE STATE OF TEXAS

VS.

LEON SPENCER

This day this cause being again called, the State appeared by her District Attorney, and the defendant Leon Spencer was brought into open court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him on this same day of this term. And thereupon the defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him and he answered nothing in bar thereof. Whereupon the

Court proceeded, in the presence of the said defendant Leon Spencer to pronounce sentence against him as follows: It is the order of the Court that the defendant Leon Spencer who has been adjudged to be guilty of Murder and whose punishment has been adjudged at confinement in the penitentiary for a term of 15 years, be delivered by the Sheriff of Jefferson County, Texas, immediately to the Superintendent of Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and the said Leon Spencer shall be confined in said penitentiaries for a term of not less than 2 (two) years nor more than 15 (Fifteen) years in accordance with the provisions of the law governing the penitentiaries of said State. And the said Leon Spencer is remanded to jail until said Sheriff can obey the directions of this sentence.

It further appearing to the Court that this defendant has been confined of his liberty in the Jefferson County Jail at Beaumont, Texas for a period of One Hundred and Sixty-Five (165) days. It is the further Order of the Court that he be allowed credit for this time on this sentence.

OWEN M. LORD,  
Judge Presiding.

[fol. 124] \* \* \*

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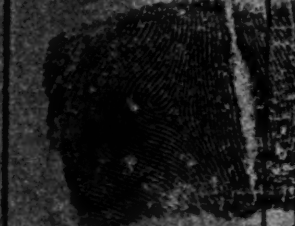
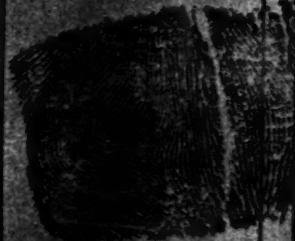
THUMB 1

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MIDDLE FINGER 3

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LITTLE FINGER 5



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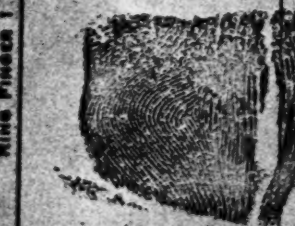
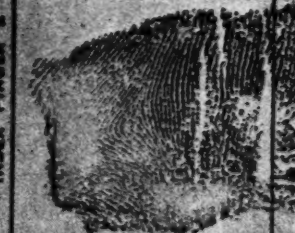
THUMB 1

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MIDDLE FINGER 3

RING FINGER 4

LITTLE FINGER 5



SIGNATURE OF PERSON TAKING PRINTS

LEFT HAND

LEFT THUMB

RIGHT THUMB

SIGNATURE OF PERSON FINGERPRINTED

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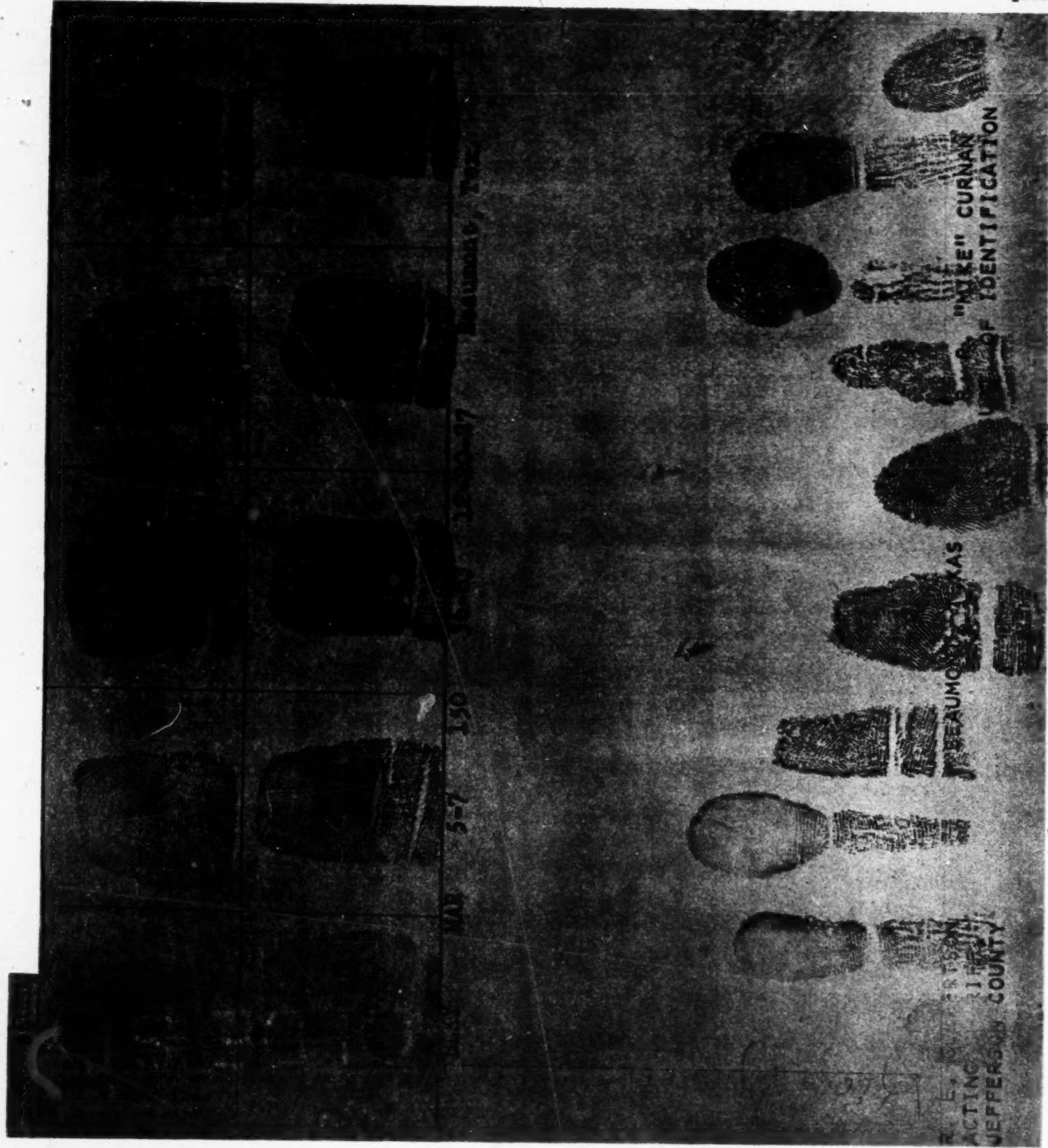
*Leon Spencer*



IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

State's Exhibit No. 4

580





[fol. 127]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 37,921

LEON SPENCER, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

APPEAL FROM JEFFERSON COUNTY

OPINION—March 17, 1965

The offense is murder; the punishment, enhanced under Art. 64, V.A.P.C., death.

Art. 64, V.A.P.C. provides that a person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary.

The testimony reflects that appellant and deceased had lived together for about four or five years and had separated in October or November, 1963. On January 7, 1964, around 7:30 P.M., deceased was at her home in the City of Beaumont with her two sons, aged fourteen and eight, and her daughter, about eighteen years of age, and her daughter's twenty month old baby. As deceased was lying on the bed playing with the baby the appellant walked into the house, entered the room where deceased was and almost immediately fired one shot with a pistol. The shot hit deceased in the face, and she fell off the bed. Deceased's daughter, who was in the room at the time this occurred, jumped over the bed and lay down on top of deceased to protect her. At that time appellant walked around the bed, pulled deceased's daughter up and fired four more shots into deceased's face and head. Appellant was attacked at that time by deceased's fourteen year old son who had seen part of this occurrence. Appellant knocked the knife out of the son's hand and walked out of the front door of the house where he stopped and appeared to be either loading or unloading the pistol. The deceased's daughter ran out of the house after him and

[fol-128] when she fell down, appellant looked back at her and told her her mother was no good and then he grinned.

After leaving the house where the shooting occurred, appellant walked into the Sheriff's Office at approximately 8:15 P.M. and had in his possession a .22 caliber pistol containing three live shells and three spent cartridge cases. This pistol was proved to have been purchased by the appellant from Phillips Pawn Shop in the City of Beaumont between 4:00 P.M. and 5:30 P.M. on January 7, 1964.

The cause of the deceased's death was established by medical testimony showing that she had died as a result of gunshot wounds to the brain.

The State proved that the defendant had been previously convicted of the offense of murder with malice as alleged in the indictment.

We find the evidence sufficient to sustain the verdict.

Appellant offered to stipulate, prior to the trial, that he had been previously convicted of murder as alleged in the second count of the indictment. Upon making this offer appellant moved the trial court to instruct the state not to read the portion of the indictment which referred to the prior conviction and not to offer any proof of said prior conviction, which motion was denied.

Appellant also objected to the reading of the indictment, and after the reading of the indictment alleging the prior conviction, he moved for a mistrial and also objected to any and all testimony in regard to the first conviction.

Appellant bottoms the foregoing contentions upon the theory that the trial court denied him due process of law by sanctioning this procedure on the part of the state before the determination of his guilt on the primary offense. He contends that there was no fact issue for [fol. 129] the determination of the jury as to his identity or the validity of the prior conviction.

Appellant also contends that Art. 64, V.A.P.C. is unconstitutional for the reason that it places the accused in double jeopardy in that this statutory provision uses the fact of the preceding offense to establish an element of the primary offense.



We shall dispose of these three related contentions together, as the parties have done in their briefs. We have consistently held that the procedure of reading an indictment to a jury showing that the person on trial has been previously convicted is not a violation of due process of law. We held in *Wright v. State*, 364 S.W.2d 384, a case in which the appellant there offered to judicially confess and stipulate as to his former conviction instead of the state offering proof of the prior conviction, that the state could not be prevented from making proof of the prior alleged conviction. Wright's conviction was under Art. 64, V.A.P.C.

In *Pitcock v. State*, 367 S.W.2d 864, this Court, speaking through this scrivener, did announce a new rule in those cases where *"the jury has no choice in imposing punishment if it finds the appellant guilty and that he has been previously convicted."* We said: "Thus, if accused stipulates the prior conviction, that issue is resolved and the question of guilt is all that remains." We are convinced of the soundness of this rule, but *it is not applicable to cases coming under Art. 64, supra.* The jury does have a choice in imposing punishment under Art. 64, as may be seen from the foregoing terms of this article.

Since appellant's contentions have been before this Court numerous times, we shall not enter into a detailed discussion. His contentions have been adversely decided by this Court in the rather recent case of *Crocker v. State*, 385 S.W.2d 392, and the very recent case of *Wig-[fol. 130] ginton v. State*, No. 37,645, and cases there cited.

We adhere to these prior holdings and overrule appellant's contentions.

We have examined with great care appellant's remaining contentions, but we find no error reflected by them. It would contribute nothing to the jurisprudence of this state by discussing them here.

Finding no reversible error, the judgment is affirmed.

MCDONALD, Presiding Judge

(Delivered March 17, 1965.)

[fol. 131]

## IN THE COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S CERTIFICATE AS TO JUDGMENT AND OVERRULING  
OF APPELLANT'S MOTION FOR REHEARING—June 3, 1965

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 37,921 styled:

LEON SPENCER, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

judgment of the Criminal District Court of Jefferson County, was affirmed on March 17, 1965, Appellant's Motion for Rehearing overruled, without written opinion, May 5, 1965, and on May 7, 1965, mandate issued.

Therefore, with the overruling of Appellant's Motion for Rehearing, this cause was disposed of by this Court on May 5, 1965, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and said judgment has now become final on the docket of this Court.

WITNESS my hand and Seal of Said Court, at office, in Austin, Texas, the 3rd day of June, A.D., 1965.

[SEAL]

/s/ Glenn Haynes,  
GLENN HAYNES, Clerk  
Court of Criminal Appeals of Texas

[fol. 132]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 37921

[Title Omitted]

NOTICE OF APPEAL TO THE SUPREME COURT  
OF THE UNITED STATES—Received June 3, 1965

1.

NOTICE is hereby given that Leon Spencer, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Criminal Appeals in its opinion and judgment rendered March 17, 1965, affirming the judgment of the Criminal District Court of Jefferson County, Texas, in the above matter, Motion for Rehearing denied without written opinion May 5, 1965.

This appeal is taken pursuant to 28 U.S.C.A. 1257, § 1 & 2.

Appellant was convicted of the crime of murder with malice under the Texas Penal Code with the punishment being enhanced under the terms and provisions of Article 64, and has been sentenced to death in the electric chair and is presently confined at the county jail in Beaumont, Jefferson County, Texas.

2.

This appeal is being made in forma pauperis by the Appellant for the reason that he had been confined in the county jail of Jefferson County, Texas, since January, 1964, and has been represented throughout his trial in this matter by Court appointed attorneys and has funds of no kind and is unable to pay for a transcript of the entire record in this cause for transmission to the Clerk of the Supreme Court of the United States, and in the event the Supreme Court of the United States allows this [fol. 133] appeal, it is respectfully requested that the Clerk of the Court of Criminal Appeals of the State of Texas forward for transmission to the Clerk of the Supreme Court of the United States all of the papers on file herein.

The following questions are presented by this appeal:

Do Article 64 of the Texas Penal Code and Article 642 of the Vernon's Annotated Code of Criminal Procedure and the accompanying procedure which requires the reading of the indictment by the prosecuting attorney after the impanelment of the jury and the presentment of proof to the jury of a prior conviction of murder with malice of a former wife prior to the determination of the guilt or innocence of the defendant on the primary charge of murder with malice of his wife deny such defendant due process of law and a fair and impartial jury as guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States of America?

Have the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States of America been violated where the defendant in a criminal proceeding in a State court is convicted in a state by statute which requires compliance with the Constitution of the United States as to guaranteeing defendants due process of law by allowing the State to inform prospective jurors of a prior conviction and to read portions of the indictment to the jury alleging a prior offense and to establish by proof the prior conviction before the jury before the determination of the guilt or innocence of the defendant on the primary offense and by further allowing the jury to decide as to the validity of the prior offense and the identification of the defendant at the same time it is determining the guilt or innocence of the defendant on the primary charge?

Respectfully submitted,

/s/ Michael D. Matheny

/s/ Louis V. Nelson

Attorneys for Appellant

1014 San Jacinto Bldg., P.O. Box 1632  
Beaumont, Texas

[fol. 134]

[Certificate of service (omitted in printing)]

53  
[fol. 135]

SUPREME COURT OF THE UNITED STATES

No. 273 Misc., October Term, 1965

LEON SPENCER, APPELLANT

v.

TEXAS

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN  
FORMA PAUPERIS—January 31, 1966

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.



[fol. 136]

## SUPREME COURT OF THE UNITED STATES

No. 273 Misc., October Term, 1965

LEON SPENCER, APPELLANT

v.

TEXAS

APPEAL from the Court of Criminal Appeals of the State of Texas.

ORDER POSTPONING JURISDICTION—January 31, 1966

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits. The case is transferred to the appellate docket as No. 967 and placed on the summary calendar and set for oral argument immediately following No. 128 Misc.



# Supreme Court of the United States

OCTOBER TERM, 1965

No. 968

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ROBERT A. BELL, JR., PETITIONER

vs.

TEXAS

---

ON WRIT OF CERTIORARI TO THE COURT OF  
CRIMINAL APPEALS OF TEXAS

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## INDEX

	Original	Print
Record from the District Court of Upton County, Texas, 112th Judicial District .....	1	1
Indictment .....	2	1
Precept to serve copy of indictment and sheriff's return thereon .....	4	3
Motion to quash indictment .....	5	4
Order overruling motion to quash .....	6	5
Statement of facts .....	7	6
Appearances .....	7	6
Offers in evidence .....	8	7

Record from the District Court of Upton County,  
Texas, 112th Judicial District—Continued

Offers In Evidence—Continued

State's Exhibit No. 1—Copies of indictment, judgment, sentence and order revoking probation in Cause No. CR 649, in the United States District Court for the Southern District of Texas, Victoria Division .....	13	10
State's Exhibit No. 2—Copy of certification of records of Federal Correctional Institution, Seagoville, Texas, (photograph, fingerprint card, and commitment) pertaining to Robert Alexander Bell, Jr. ....	21	17
Testimony of Jack Mercer—direct .....	25	21
State's Exhibit No. 3—Copy of fingerprint card of Robert Alexander Bell, Jr. ....	27	23
Testimony of Jack Mercer (continued)		
—direct .....	28	24
—cross .....	28	24
—redirect .....	29	24
Court's charge to the jury .....	30	25
Objections to Court's charge and order overruling same .....	37	33
Judgment .....	38	34
Sentence .....	40	35
Bill of exception No. 1 and order thereon .....	41	36
Clerk's certificate (omitted in printing) .....	42	37
Proceedings in the Court of Criminal Appeals of Texas .....	43	38
Opinion, Morrison, J. ....	43	38
Clerk's certificate as to judgment and overruling of appellant's motion for rehearing .....	45	40
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari .....	46	41

[fol. 1]

**IN THE DISTRICT COURT OF UPTON COUNTY, TEXAS  
112th JUDICIAL DISTRICT**

No. 304

**THE STATE OF TEXAS**

*vs.*

**ROBERT A. BELL, JR.**

[fol. 2]

**IN THE DISTRICT COURT  
OF UPTON COUNTY, TEXAS**

[File Endorsement Omitted]

**INDICTMENT—Filed August 1, 1964**

**IN THE NAME AND BY THE AUTHORITY OF THE  
STATE OF TEXAS:**

The Grand Jurors, duly selected, organized, sworn and impaneled as such for the County of Upton, State of Texas, at the June, A. D. 1964, Term of the 112th District Court for said County, upon their oaths present in and to said Court that on or about the 13th day of December, A. D. 1963, and before the presentment of this indictment, in the County and State aforesaid, Robert A. Bell, Jr. did, then and there unlawfully in and upon G. E. Wolfrum make an assault and did then and there, by the said assault, and by violence to the said G. E. Wolfrum, and by putting the said G. E. Wolfrum in fear of life and bodily injury, did then and there fraudulently, and without the consent of the said G. E. Wolfrum, take from the person and possession of him, the said G. E. Wolfrum,

one thousand dollars cash, the same being the corporal personal property of the said G. E. Wolfrum, with the intent to deprive the said G. E. Wolfrum of the same and to appropriate the same to the use and benefit of him, the said Robert A. Bell, Jr., against the peace and dignity of the State; which offense is less than capital;

And the Grand Jurors aforesaid do further present that prior to the commission of the aforesaid offense by the said Robert A. Bell, Jr., that, on the 16th day of November, 1953, in the United States District Court for the Southern District of Texas, Victoria Division, in cause No. CR. 649 on the docket styled, "United States of America vs. Robert Alexander Bell, Jr.," the said Robert A. Bell, Jr., was duly and legally convicted in said last named court of a felony, less than capital, and one of like character as alleged against him in the first paragraph hereof, to-wit, Bank Robbery, upon indictment then legally pending in said last named court and which said court had jurisdiction; and that on the 3rd day of December, 1953, in the same said cause in the last named court, the said Robert A. Bell, Jr., was sentenced pursuant to the said conviction but that the execution of said sentence was suspended and said Robert A. Bell, Jr., was placed on probation; and that thereafter, to-wit, on the 19th day of April, 1957, in the same said cause in the last named court, said probation was revoked and the said conviction thereby and then and there became final; and said conviction was for an offense committed by the said Robert A. Bell, Jr., prior to the commission of the offense hereinbefore charged against him as set forth in [fol. 3] the first paragraph hereof; and the said conviction was final prior to the commission of the offense hereinbefore charged against him as set forth in the first paragraph hereof; and he, the said Robert A. Bell, Jr., was and is the same person who was convicted in cause No. CR. 649 in the United States District Court for the Southern District of Texas, Victoria Division.

against the peace and dignity of the State.

/s/ JOHN P. GODWIN

Foreman of the Grand Jury

[fol. 4]

IN THE DISTRICT COURT  
OF UPTON COUNTY, TEXAS

[File Endorsement Omitted]

PRECEPT TO SERVE COPY OF INDICTMENT—Filed  
August 1, 1964

THE STATE OF TEXAS

TO THE SHERIFF OF UPTON COUNTY, SAID  
STATE, GREETING:

YOU ARE HEREBY COMMANDED to deliver forth-  
with to Robert A. Bell, Jr., now in your custody, the  
accompanying certified Copy of Indictment in Cause No.  
304, THE STATE OF TEXAS vs. ROBERT A. BELL,  
now pending in the District Court of Upton County,  
Texas, and to make due return of this writ without de-  
lay.

Issued and given under my hand and seal of Office, this  
1st day of August, A.D. 1964.

(SEAL)

/s/ NANCY K. DAUGHERTY, Clerk,  
District Court, Upton County, Texas.

By ..... Deputy.

SHERIFF'S RETURN

Came to hand on the 1 day of Aug., A. D. 1964, at  
2:00 o'clock P. M., and executed on the same day, by  
delivering to the within named defendant, Robert A. Bell,  
Jr., in person, a certified copy of indictment as directed  
by this writ.

Returned on the 1 day of Aug., A. D. 1964.

H. E. ECKOLS Sheriff,  
Upton Co., Texas.

By S. O. LANGFORD, Deputy.

[fol. 5]

IN THE DISTRICT COURT  
OF UPTON COUNTY, TEXAS

No. 304

[File Endorsement Omitted]

[Title Omitted]

MOTION TO QUASH INDICTMENT—Filed August 12, 1964

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, ROBERT A. BELL, JR., the Defendant in the above styled and numbered cause, and moves the indictment be quashed in this cause and set aside for the following reasons:

I.

That the indictment herein alleges as a part of the indictment the primary count of robbery by assault, and the prior conviction of the Defendant on another offense, and is prejudicial and inflammatory to the jury and precludes the Defendant from his constitutional right under the 6th amendment of the Constitution of the United States to be tried by a fair and impartial jury and likewise a denial of due process under the 5th and 14th amendments of the Constitution of the United States.

/s/ HOWARD O. LAKE  
Attorney for Defendant  
405 Scanlan Building  
Houston 2, Texas CA 4-9249



[fol. 6]

IN THE DISTRICT COURT  
OF UPTON COUNTY, TEXAS

No. 304

[File Endorsement Omitted]

[Title Omitted]

ORDER OVERRULING MOTION TO QUASH—August 12, 1964

This the 12th day of August, 1964, the foregoing cause being called for trial, the State appeared by her District Attorney and the Defendant in person and by his attorneys of record and the Defendant filed the foregoing motion to quash the indictment in said cause which motion was heard and considered and is overruled by the Court.

/s/ CHARLES SHERRILL  
Judge

Excepted To

/s/ HOWARD O. LAKE  
HOWARD O. LAKE  
Attorney for Defendant

[fol. 7]

IN THE DISTRICT COURT  
OF UPTON COUNTY, TEXAS  
112TH JUDICIAL DISTRICT

No. 304

THE STATE OF TEXAS, PLAINTIFF

v.

ROBERT A. BELL, JR., DEFENDANT

## STATEMENT OF FACTS—AUGUST 12, 1964

THE ABOVE STYLED CAUSE came on to be heard before the Honorable Charles E. Sherrill, Judge Presiding, sitting with a Jury, commencing at 10:00 a.m., on August 12, 1964, when the following proceedings were had and done:

## APPEARANCES

MR. DIXON MAHON, District Attorney, and MR. JOHN MENEFEE, County Attorney of Upton County, for the State.

MR. HOWARD LAKE, of Houston, Texas, MR. THOMAS R. SCOTT, of Fort Stockton, Texas, and MR. AUBREY EDWARDS, of Big Lake, Texas, for the Defendant.

[fol. 8]

## PROCEEDINGS

(Thereupon, the jury panel was called, sworn and qualified by the Court; after which preliminary motions were presented by the State and Defense; the panel was examined by both counsel, a jury selected, seated and sworn; after which the court was in recess from 11:10 a.m., to 1:00 p.m., of the same day, when the court reconvened pursuant to the recess:)

THE COURT: Are you ready to proceed?

MR. MAHON: Ladies and gentlemen, I am now going to read the indictment about which we talked this morn-

ing. This is the charge and the allegations which the State expects to prove.

(Thereupon, the indictment was read:)

MR. MAHON: To which indictment the defendant pleads?

MR. LAKE: Not guilty.

THE COURT: Thank you, gentlemen.

## EVIDENCE ON BEHALF OF THE STATE.

### OFFERS IN EVIDENCE

MR. MAHON: Your Honor, first we would like to offer into evidence, as State's Exhibit #1, the indictment, the judgment, the sentence placing the defendant upon probation and the order revoking such probation in Cause Number 649—CR 649, in the United States District Court for the Southern District of Texas, Victoria Division, in a case entitled United States of America versus Robert Alexander Bell, Jr.

[fol. 9] MR. LAKE: Your Honor, may we have a moment to go over these?

THE COURT: Yes, sir.

MR. LAKE: If the Court please, we would take these instruments in the following order; I think the proper order would be the indictment first.

THE COURT: Yes.

MR. LAKE: We object to the introduction of this instrument first on the ground it is hearsay, and secondly on the ground that this indictment alleges robbery by assault in the indictment, and no where in the indictment is this charge referred to as bank robbery as set out in the indictment in this case, and third, on the ground the indictment itself is not—the indictment does not show that this is an offense less than capital as alleged in the indictment here involved.

THE COURT: To which the Court overrules the objections. You have your exception, sir.

MR. LAKE: Note our exception, if the Court please.

I believe the next in order would be the conviction—or the final judgment and sentence—no, I believe the

next in order would be the judgment of guilty in that particular cause and to that instrument, we likewise make the same objection, as it would be hearsay in this cause, and likewise that it does not show in the judgment that it is for an offense less than capital.

THE COURT: The same ruling. You are expressly overruled. You have your exception.

[fol. 10] MR. LAKE: Note our exception to that, if the Court please.

I believe the next instrument in order would be the final judgment and sentence, which was a suspended sentence in that cause.

To those instruments, we likewise object to it on the ground it is hearsay and that the sentence shown in this particular cause shows that the sentence in this court in this cause was pronounced in Houston, Texas, whereas the cause referred to in the indictment was alleged to have been committed and the original sentence imposed in Victoria, and further on the ground there is no showing this is for an offense less than capital.

THE COURT: You are expressly overruled. You have your exception, sir.

MR. LAKE: Note our exception, and finally to the judgment of the District Court of the Southern District of Texas, Victoria Division, this is the judgment revoking the suspended sentence, to which we likewise file the objections on the ground that this is hearsay and that this instrument does not show it was for an offense less than capital and likewise this judgment revoking the suspended sentence was likewise issued out of the Houston court, whereas the original sentence was made in Victoria.

THE COURT: You are expressly overruled. You do have your exception.

MR. LAKE: Note our exception.

THE COURT: It is admitted.

[fol. 11] MR. MAHON: I am going to read it to the jury.

THE COURT: Excuse me, counsel, would you approach the bench?

(Thereupon, the following occurred at the bench, outside the hearing of the jury:)

MR. LAKE: While we are here before the bench, may I make, in order that I do not waive the first motion I made this morning, may I renew my motion on the reading of these prior offenses, on the same ground alleged in our motion to quash?

THE COURT: Fine.

MR. LAKE: In that it is a violation of his constitutional rights of the United States.

THE COURT: Fine. Thank you.

MR. LAKE: That will be overruled, I take it?

THE COURT: Yes, you are overruled. You have your exception.

MR. LAKE: Note our exception.

Your Honor, I believe it will show in these instruments that the judgment was for a plea on Count I only and for that reason I believe Count II would be immaterial and I think the jury should be instructed at this point there was no finding on Count II in this particular indictment. I believe the record will show that.

MR. MAHON: This is right, Judge, and we ask you to so rule.

THE COURT: The jury will disregard the reading of [fol. 12] the portion of Count II there.

MR. MAHON: I just won't read it.

(Thereupon, said documents were received in evidence as State's Exhibit #1, were read to the jury, and same is attached hereto, at this point:)



[fol. 13]

Judgment and Commitment (Rev. 7-52)

STATE'S EXHIBIT NO. 1

Microfilmed

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
VICTORIA DIVISION

No. Cr. 649

UNITED STATES OF AMERICA

v.

ROBERT ALEXANDER BELL, JR.

---

On this 19th day of April, 1957 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has violated the terms of probation provided in the Final Judgment and Sentence entered on December 3, 1953, convicting him of the offense of bank robbery, in violation of Title 18, U. S. Code, Section 2113, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the probation is revoked.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of ' THREE  
(3) YEARS.

TRUE COPY I CERTIFY

ATTEST:

V. BAILEY THOMAS, Clerk

By /s/ F. Matloch  
Deputy Clerk

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Joe Ingraham  
United States District Judge.

The Court recommends commitment to: <sup>6</sup>

APPROVED: /s/ Illegible

Clerk

<sup>1</sup> Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." <sup>2</sup> Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. <sup>3</sup> Insert "in count(s) number" if required.

<sup>4</sup> Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. <sup>5</sup> Enter any order with respect to suspension and probation. <sup>6</sup> For use of Court wishing to recommend a particular institution.

[fol. 14]

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
VICTORIA DIVISION  
(SITTING AT HOUSTON, TEXAS)

CR. No. 649

FINAL JUDGMENT AND SENTENCE  
(SUSPENDED)

UNITED STATES OF AMERICA

vs.

ROBERT ALEXANDER BELL, JR.

On this 3rd day of December, 1953, came the attorney for the United States of America, and the defendant, Robert Alexander Bell, Jr. appeared in person and with counsel, and defendant and counsel stated to the Court that they desired sentence to be imposed at Houston, Texas, waiving right to be sentenced at Victoria, Texas.

It is adjudged that the defendant has been convicted upon his plea of guilty in accordance with the findings of the Court rendered in this cause on the 16th day of November, 1953, of the offense of bank robbery, Vio. Sec. 2113, Title 18, U. S. Code, as charged in count one of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, and the defendant having been afforded an opportunity to make a statement in his own behalf and present and information in mitigation of punishment,

It is the sentence of the Court that the defendant be he is hereby committed to the custody of the Attorney General or his authorized representative for a period of FIVE (5) YEARS.

The execution of this sentence is suspended for the [fol. 15] term of five (5) years, conditioned on compliance with the terms of the general order of this court, dated August, 10, 1937, which order is made a part of this

sentence and defendant is placed under the supervision of the United States Probation Officer for the Victoria Division of this District.

/s/ James V. Allred  
Judge

[fol. 16]

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
VICTORIA DIVISION

CR. No. 649

UNITED STATES OF AMERICA

vs.

ROBERT ALEXANDER BELL, JR.

JUDGMENT OF GUILTY

On this 16th day of November, 1953, came the attorney for the United States of America and the defendant, Robert Alexander Bell, Jr. appeared in person and with counsel, and both parties announcing ready, the said defendant, having been served with a copy of the indictment, was arraigned; whereupon the defendant entered a plea of guilty to count 1 of the indictment, whereupon the court, on motion of the United States Attorney, dismissed count 2 of the indictment.

And the Court, having heard the plea of the defendant and all questions of fact as well as of law, finds the defendant guilty as charged, in count 1 of the indictment.

It is considered by the Court that the defendant be, and he is hereby adjudged guilty of bank robbery, Vio. Sec. 2113, Title 18, U. S. Code as charged in count 1 of the indictment.

The probation officer is directed to make a presentence investigation, and this case is passed for sentence until Thursday, December 3, 1953, at Houston, Texas.

/s/ James V. Allred  
Judge

[fol. 17]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
VICTORIA DIVISION

CR. No. 649

UNITED STATES OF AMERICA

*vs.*

ROBERT ALEXANDER BELL, JR.

## INDICTMENT

## THE GRAND JURY CHARGES:

## COUNT ONE

That on or about August 9, 1953, within the Victoria Division of the Southern District of Texas and within the jurisdiction of this Court, one ROBERT ALEXANDER BELL, JR. did, by force and violence and by intimidation, take from the person and presence of LaVerne H. Brieger certain property and money, to-wit: approximately Eight Hundred Eighty-one and No/100 Dollars (\$881.00) in coin and currency belonging to and in the care, custody, control and possession of the First National Bank of Yorktown, Yorktown, Texas, a bank then organized and operating under the laws of the United States and a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation. Vio. Title 18, Section 2113, U. S. Code.

## COUNT TWO

That on or about August 9, 1953, within the Victoria Division of the Southern District of Texas and within the jurisdiction of this Court, one ROBERT ALEXANDER BELL, JR. did take and carry away with intent to steal and purloin certain property and money of a value in excess of One Hundred Dollars (\$100.00), to-wit: approximately Eight Hundred Eighty-one and



No/100 Dollars (\$881.00) in coin and currency belonging to and in the care, custody, control and possession of the First National Bank of Yorktown, Yorktown, Texas, a bank then organized and operating under the laws of the [fol. 18] United States and a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation. Vio. Title 18, Section 2113, U. S. Code.

/s/ Illegible

Foreman of the Grand Jury

[s] Illegible

Assistant United States Attorney

WBB:hv

[fol. 19] MR. MAHON: May it please the Court, we now offer in evidence what purports to be a certification of records from the Warden of the Federal Penal Institution located at Seagoville, Texas.

MR. LAKE: May we approach the bench?

THE COURT: Please approach the bench.

MR. LAKE: Your Honor, we would object to these instruments for the following reason: First there is attached to these exhibits a certificate attachment; it certifies that these exhibits attached are true and correct copies of the original records, and the exhibits themselves are not certified. There is no certification that this picture or these finger prints are the original finger prints taken at the institution. The defense has no way of knowing whether or not these finger prints or this picture is merely a copy of prints or records that were made at some other institution and forwarded as a copy to this institution, or whether or not they were actually made at the institution and that the original copy of this

photograph and these prints is on file in that institution. We think since they are not certified as such that they are improper, and not identified as this individual in this particular case. We feel it is improper to certify copies merely by attaching a certificate and certifying to a group of exhibits rather than each exhibit itself. We feel each exhibit itself must be, on its own, certified as a copy of an original that is on file in that institution in order to qualify it to be admitted under Article 3737E.

MR. MAHON: Of course, nobody does that, not even a County Clerk. The statute clearly says a microfilm or [fol. 20] any other reproduction can be admitted.

THE COURT: The Court does overrule your objection. You have your exception.

MR. LAKE: Note our exception to that.

MR. MAHON: We offer this as State's Exhibit #2. Gentlemen, I will now read this exhibit to you.

(Thereupon, said exhibit was read to the jury.)

MR. LAKE: May it please the Court, in order that we do not waive our original objection in our motion to quash, may we at this time renew it to the introduction of these instruments at this time.

THE COURT: Your original objection as previously stated is overruled. You do have your exception.

Such instruments are admitted.

(Thereupon, said instruments were received in Evidence as State's Exhibit #2, and are attached at this point:)

[fol. 21]

## STATE'S EXHIBIT NO. 2

## CERTIFICATION OF RECORDS

H. J. DAVIS hereby certifies as follows:

That he is the Warden or Superintendent of the Federal Penal Institution located at SEAGOVILLE, TEXAS and as such that he is the official custodian of the records of the said Federal Penal Institution, that the official name of the Federal Penal Institution of which he is the Warden or Superintendent is FEDERAL CORRECTIONAL INSTITUTION—SEAGOVILLE, TEXAS; and that the following and attached records are true and correct copies of original records of said Federal Penal Institutional pertaining to one:

BELL, Robert Alexander, Jr., Register No. 7644-ST and consisting of:

(1) Photograph (2) Fingerprint card and (3) Commitment

IN WITNESS WHEREOF, I have hereunto set my hand and seal at FCI, Seagoville, Texas this 10th day of July A.D. 1964.

/s/ H. J. Davis  
Signature of Custodian  
Warden  
Title

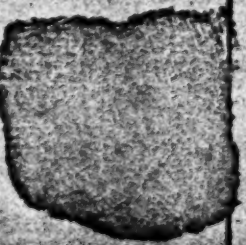
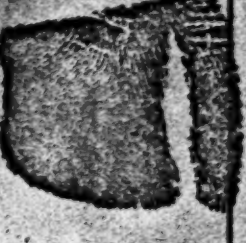
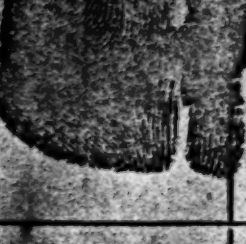


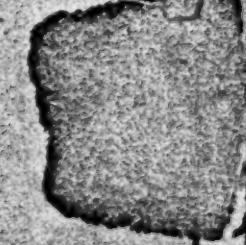
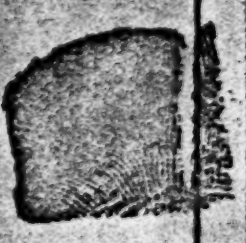

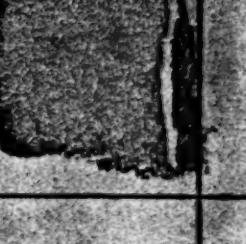


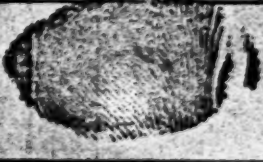

On this 10th day of July, 1964.

H. J. DAVIS  
(Name of Custodian)  
subscribed and verified his name and title

/s/ D. M. Tunnell  
D. M. TUNNELL, Notary Public  
In and for Dallas County, Texas  
(Signature of Notary or other officer  
administering oath)





FBI No. 339 139 A [Signature] SIGNATURE OF PERSON FINGERPRINTED		SIGNATURE OF PERSON FINGERPRINTED Houston, Texas OCCUPATION Oil Field Worker-Truck Driver SCARS AND MARKS 10" scar on L. forearm, Artificial L. eye.		NAME THIS PERSON CLASS RACE	
ADDRESS NUMBER 7666-57 PLACE OF BIRTH Tex. CITIZENSHIP U.S. <input type="checkbox"/> CHECK IF NO RECORDS <input checked="" type="checkbox"/> IS DESIRED		DATE 7-23-59		1. RIGHT THUMB 	
2. RIGHT INDEX 		3. RIGHT MIDDLE 		4. RIGHT RING 	
5. RIGHT PINKY 		6. LEFT THUMB 		7. LEFT INDEX 	
8. LEFT MIDDLE 		9. LEFT RING 		10. LEFT PINKY 	
LEFT FOUR FINGERS TAKEN SIMULTANEOUSLY 		RIGHT THUMB 		RIGHT FOUR FINGERS TAKEN SIMULTANEOUSLY 	



[fol. 24]

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
VICTORIA DIVISION

No. Cr. 649

UNITED STATES OF AMERICA

v.

ROBERT ALEXANDER BELL, JR.

On this 19th day of April, 1957 came the attorney for the government and the defendant appeared in person and<sup>1</sup> by counsel.

IT IS ADJUDGED that the defendant has violated the terms of probation provided in the Final Judgment and Sentence entered on December 3, 1953, convicting him of the offense of bank robbery, in violation of Title 18, U. S. Code, Section 2113, as charged.

IT IS ADJUDGED that the probation is revoked.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOE INGRAHAM  
United States District Judge

The Court recommends commitment to:

APPROVED:

[fol. 25] MR. MAHON: Come around, Mr. Mercer.

JACK MERCER, called as a witness, being duly sworn, was examined and testified as follows:

### DIRECT EXAMINATION

Q (BY MR. MAHON:) Would you please state your name?

A Jack Mercer.

Q By whom are you employed, Mr. Mercer?

A The Texas Department of Public Safety at Austin, Texas.

Q What are your duties in that employment?

A My title is Latent Finger Print expert. I work with finger print classification and filing them.

Q What training have you had for that job, Mr. Mercer?

A Prior to my going to work with the department, I had a course at the Institute of Applied Science, which teaches a person to classify, search, file and identify fingerprints from the fingers and hands and so forth.

Q More or less just as quickly as possible, how do you go about identifying fingerprints?

A Fingerprints are various patterns, such as arches, loops and swirls, and in common language, it would be similar to a person looking at Fords, Dodges and Buicks and so forth, we look for different types of patterns and then examine the details of the pattern to determine if the patterns have the same identifying characteristics in them, and if they have, they are identical; if they do not [fol. 26] have these exact details and characteristics, they are not identical.

Q How long have you worked for the department?

A It will be 21 years in September.

Q I am going to hand you what purports to be some finger prints and ask you whether or not you can identify those?

A Yes, I can.

Q Would you tell us what they are?

A This is a set of fingerprints from the fingers of Robert Alexander Bell, Jr.

Q And, who took these prints?

A I took them this morning, sir.

Q Did you do that under the normal procedures?

A Yes, I did.

MR. LAKE: Your Honor, we would object to them at this time on the ground they have not been connected up and would be immaterial at this time.

Q Let me ask you one more question: Did you take these prints from any person here in the courtroom?

A Yes, I did. The person on the end of the table there.

Q Let the record reflect he is pointing to the defendant, Robert A. Bell, Jr.

We so offer them.

THE COURT: At this time, the court does admit them in evidence. You have your exception.

MR. LAKE: Note our exception.

(Thereupon, said document was received in evidence as State's Exhibit # 3, and is attached hereto at this point.)

STATE'S EXHIBIT NO. 3

LEAVE THIS SPACE BLANK		TYPE OR PRINT LAST NAME		FIRST NAME	ALIASE	SEX	RACE
SIGNATURE OF PERSON FINGERPRINTED <i>Robert A. [Signature]</i> 8:45 am 8-12-64		CONTINUATOR AND ADDRESS SHERIFF'S OFFICE RANKIN, TEXAS				HT.	WE.
CLARK AND MARKS <i>Frank J. [Signature]</i>		YOUR NAME				AGE	EYES
SIGNATURE OF OFFICIAL TAKING FINGERPRINTS <i>Frank J. [Signature]</i>		PLACE FBI NUMBER HERE		LEAVE THIS SPACE BLANK		DATE OF BIRTH	
DATE		CHECK IF NO REPLY IS DESIRED		CLASS		PLACE OF BIRTH	

1. RIGHT INDEX	2. RIGHT MIDDLE	3. RIGHT RING	4. RIGHT PINKY	5. LEFT PINKY	6. LEFT RING	7. LEFT MIDDLE	8. LEFT INDEX	9. LEFT PINKY	10. LEFT RING	11. LEFT MIDDLE	12. LEFT INDEX				
LEFT FOUR FINGERS TAKEN SIMULTANEOUSLY				RIGHT FOUR FINGERS TAKEN SIMULTANEOUSLY				LEFT PINKY AND RING TAKEN SIMULTANEOUSLY				RIGHT PINKY AND RING TAKEN SIMULTANEOUSLY			



[fol. 28] Q (BY MR. MAHON:) Now, Mr. Mercer, I am going to simply hand you State's Exhibit #2, which was the copy of the record from Seagoville, and also hand you Exhibit 3, which we just placed in evidence, and I would like for you to tell us first, have you seen this exhibit prior to this time?

A Yes, sir; I have.

Q Have you had an opportunity to examine these and compare these two records?

A Yes, sir, I have.

Q And in your opinion, as an expert, are they identical?

A Yes, they are identical, made by one and the same person.

MR. MAHON: Pass the witness.

### CROSS EXAMINATION

Q (BY MR. LAKE:) Mr. Mercer, this exhibit here you have identified as the one you took this morning, is that correct?

A That is correct, sir.

Q All right. Now, this State's Exhibit #2, that you have identified, has attached to it a separate piece of paper that identifies these prints as part of the records of the Federal Correctional Institution, you have no personal knowledge yourself of when or where these particular prints were made, do you?

A No, I do not.

Q As far as you are concerned, they could have been made anywhere? In this jail or anywhere else?

[fol. 29] A That is correct.

Q So, your identification is on the print you made as to the prints that you cannot testify as to their verification, when or where they were made?

A I cannot testify where they were made is correct.

MR. LAKE: That is all.

### REDIRECT EXAMINATION

Q (BY MR. MAHON:) But you are testifying, Mr. Mercer, that the print which I handed you, which were attached to the certification of records from the Federal



Correctional Institution in Seagoville, those prints and the prints you took this morning were identical?

A That is correct; made by one and the same person.

MR MAHON: That is all.

MR. LAKE: We have nothing further.

(Witness Excused.)

\* \* \* \*

[fol. 30]

IN THE DISTRICT COURT  
OF UPTON COUNTY, TEXAS

No. 304

[File Endorsement Omitted]

[Title Omitted]

COURT'S CHARGE TO THE JURY—Filed August 12, 1964

GENTLEMEN OF THE JURY:

The defendant is on trial before you charged by indictment with the offense of robbery by assault, alleged to have been committed in the County of Upton and State of Texas, on or about the 13th day of December, 1963.

To this charge the defendant has entered his plea of not guilty.

For your guidance and instruction in arriving at a verdict, I charge you the law as follows:

1.

You are the exclusive judges of the facts proved, the weight of the evidence and the credibility of the witnesses; but the law you will receive from the Court contained in these written instructions and be governed thereby.

## 2.

In all criminal cases the burden of proof is upon the State to prove the guilt of the defendant beyond a reasonable doubt. The defendant in a criminal case is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, and if you have a reasonable doubt as to the defendant's guilt, you will acquit the defendant and say by your verdict "not guilty."

## 3.

You are limited in your deliberations to the consideration and discussion of such facts and circumstances only as were admitted in evidence, or as the reasonably deducible from the evidence, and you must not consider or discuss any facts or circumstances not thus in evidence or reasonably deducible from the evidence. No juror may lawfully relate to the others any fact or circumstance of which he may have knowledge or information not introduced in evidence, and you must not consider or discuss anything else, as far as the evidence is concerned, except evidence introduced by the parties, admitted by the Court, and not withdrawn from your consideration, and reasonable deductions from such evidence.

[fol. 31]

## 4.

You are instructed that the fact a Grand Jury bill of indictment has been returned in this case charging the defendant with the offense alleged in the indictment is not evidence of guilt.

## 5.

You are instructed that no act done in a state of insanity can be punished as an offense. Every man is presumed to be sane until the contrary appears to the jury trying him. He is presumed to entertain, until the contrary appears, a sufficient degree of reason to be responsible for his acts; and to establish a defense on the ground of insanity, it must be shown by a preponderance of the evidence that, at the time or times inquired about, the party accused was laboring under such defect of

reason as not to know the nature and quality of the act he was doing, or if he did know, that he did not know he was doing wrong, that is, that he did not know the difference between the right and wrong as to the particular act charged against him. The insanity must have existed at the very time or times inquired about, that is, at the very time of the alleged commission of the offense, and the mind must have been so dethroned of reason as to deprive the person *accused* of a knowledge of the right and wrong as to the particular act done.

The burden of proof, as to insanity, is upon the defendant to prove his insanity by a preponderance of the evidence. By "preponderance of the evidence" is meant the greater weight of the credible testimony.

Now, if you believe from the evidence beyond a reasonable doubt that the defendant Robert A. Bell, Jr., did commit robbery by assault, as alleged in the indictment, but you further believe, by a preponderance of the evidence, that at the time he committed the said act, if he did, the defendant was then insane, as that term is herein defined for you, then you will find the defendant not guilty by reason of insanity and so state in your verdict.

#### 6.

If any person, by assault, or by violence or by putting in fear or life or bodily injury, shall fraudulently take from the person or possession of another, any property with the intent to appropriate the same to his own use, he shall be guilty of robbery.

[fol. 32]

#### 7.

The term "fraudulently take" as used in the preceding paragraph, means that the person or persons taking knew at the time of the taking, the property was not his, that the property was taken without the consent of G. E. Wolfrum, with the intent to deprive him of its value and to appropriate it to the taker's own use or benefit.

#### 8.

The use of any unlawful violence upon the person of another with the intent to injure such person, whatever

be the means or degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with an ability to commit a battery, is an assault.

## 9.

By the expression "coupled with an ability to commit a battery", is meant that the person making the assault must, at the time, be in such position and within such distance of the person assaulted to enable him to commit a battery by the means used.

## 10.

Bearing in mind the foregoing, you are further charged that if you find and believe from the evidence in this case beyond a reasonable doubt that on or about the 13th day of December, 1963, in the County of Upton, and State of Texas, Robert A. Bell, Jr. did then and there, by making an assault upon the person of G. E. Wolfrum, and by violence upon him and by putting the said G. E. Wolfrum in fear of life and bodily injury, and by such means did fraudulently take from the person and possession of the said G. E. Wolfrum, without his consent and against his will, One Thousand Dollars in cash, all of such being the corporeal *personal* property of and belonging to the said G. E. Wolfrum, and that it was so taken, if it was, with the fraudulent intent then and there upon the part of him, the said Robert A. Bell, Jr., to deprive the said G. E. Wolfrum of the value of said property and with the intent then and there to appropriate the same to the use and benefit *not* of him, the said Robert A. Bell, Jr., then and in that event, you will find the defendant Robert A. Bell, Jr., guilty and assess his punishment at confinement in the penitentiary for any [fol. 33] term of not less than five years.

If you do not so believe or find or if you have a reasonable doubt thereof, you will acquit the defendant and so say by your verdict.

## 11.

You are charged that when one person owns property and another person has actual control, care and *mangement* of the same, the ownership may be alleged in either, and if you believe from the evidence that Evans Foodway was the actual owner of the money mentioned in the indictment and that G. E. Wolfrum had at the time of the alleged robbery actual control, care and management of the same, then I charge you as the law of this case, that the said G. E. Wolfrum was in law the owner and in possession of the same.

## 12.

Now, bearing in mind the foregoing definitions and instructions, if you believe from the evidence beyond a reasonable doubt that the said defendant on or about the 13th day of December, 1963, as alleged in the first paragraph of the indictment herein, in the County of Upton and State of Texas, did then and there commit robbery by assault, then you will find him guilty of robbery by assault and assess his punishment at imprisonment in the *penitentiary* for not less than five years nor more than life, provided you further find that any or all of the allegations set out in the second paragraph of the indictment herein are untrue, or if you have a reasonable doubt as to the truth of any or all of said allegations, and the form of your verdict will be as follows:

“We the jury find the defendant guilty of robbery by assault as charged in the first paragraph of the indictment herein, and fix his punishment at ..... years confinement in the penitentiary.”

If you should find the defendant not guilty as set out in the first paragraph of the indictment herein, charging the offense of robbery by assault, then you will disregard the second paragraph of the indictment herein, and find the defendant not guilty.

The indictment in this cause, in addition to the first paragraph thereof, also alleges in the second paragraph thereof that the defendant, before the date alleged in the first paragraph of the said indictment, committed



[fol. 34] and was duly, legally and finally convicted of a felony less than capital, and one of like character as alleged in the first paragraph thereof, to wit: The offense of bank robbery, upon an indictment then pending in the United States District Court for the Southern District of Texas, Victoria Division, in Cause No. CR649.

To each of said paragraphs of the indictment herein the defendant has placed that the allegations in said paragraph are not true.

If you should find and believe from the evidence beyond a reasonable doubt that the defendant is guilty of robbery by assault as charged in the first paragraph of the indictment, and you further find and believe from the evidence that the State has proven to your minds beyond a reasonable doubt that the defendant, prior to the commission of the offense by him, if any be committed, on the 13th day of December, 1963, as alleged in the first paragraph of the indictment herein, was duly and legally convicted in the United States District Court for the Southern District of Texas, Victoria Division, in Cause No. CR649 on the docket of said court; of the offense of bank robbery upon an indictment then pending in such court of a felony offense less than capital, and of like character with the offense of robbery by assault, which indictment, if any, was then legally pending in said last named court, and of which the said court had jurisdiction, and that said conviction, if any, was a final conviction, and was a conviction which became final prior to the commission, if any, of the offense charged against said defendant in the first paragraph of the indictment herein, and that each and all of the allegations set out in the first and second paragraphs of the indictment herein are true, then you will find the defendant guilty of robbery by assault as charged in the first paragraph of the indictment herein, and that each and all of the allegations set out in the second paragraph of the indictment herein are true, and the form of your verdict will be as follows:

"We the jury find the defendant guilty of Robbery by Assault, as charged in the first paragraph of the indictment herein, and we further find that each and all of the allegations set out in the second paragraph

of the indictment herein, charging a final conviction for the offense of bank robbery are true."

[fol. 35] If you find the defendant not guilty as charged in the first paragraph of the indictment herein, charging the offense of robbery by assault, then you will disregard the second paragraph of the indictment and find the defendant not guilty, and the form of your verdict will be as follows:

"We, the jury, find the defendant not guilty."

13.

You are further charged that even though you may find and believe from the evidence beyond a reasonable doubt that the defendant committed and was convicted of the offense charged in the second paragraph of the indictment herein, yet, you are instructed that you cannot consider such commission, if any, or conviction, if any, or any evidence relating thereto, if any, in passing upon the issue of the guilty, if any, or the innocence, if any, of the defendant for the offense set out in the first paragraph of the indictment herein.

14.

You are further instructed that all of the offenses referred to in the indictment herein are felonies less than capital and are of like character.

15.

In case you find the defendant guilty of every *allegation* contained in the first paragraph of the indictment and further find that each and all of the allegations set out in the second paragraph of the indictment are true, then your verdict should conform to the second form of verdict set out in this charge and in such event you will not affix any number of years as punishment for the defendant as the punishment in such cases is fixed by law and same shall be adjudged by the Court after the return of your verdict duly signed by your foreman.

## 16.

You are further instructed that the law provides that the failure of the defendant to testify shall not be taken as a circumstance against him, and you must not allude to, comment on or discuss in your deliberations the failure of the defendant to testify in this case.

If you find the defendant not guilty, you will simply say so in your verdict, signed by your foreman.

[fol. 36] If you find the defendant guilty, you must not decide his punishment by lot or chance but simply state for what offense and assess the proper penalty therefor.

You cannot make any report to the court or receive any advice from the court except in open court by communication either verbal or written.

I hand you herewith on separate sheets of paper, forms of verdict in accordance with the various verdicts that may be rendered in this case, and you are instructed that you will adopt the form which is in accordance with your findings, having the same signed by your foreman, whom you will select from your number when you retire, and return your verdict into open court.

/s/ CHARLES SHERRILL  
Judge Presiding

\* \* \* \*

[fol. 37]

IN THE CRIMINAL DISTRICT COURT  
OF UPTON COUNTY, TEXAS

No. 304

[File Endorsement Omitted]

[Title Omitted]

OBJECTIONS TO COURT'S CHARGE—Filed August 12, 1964

COMES NOW, the Defendant, ROBERT A. BELL, JR., in the above numbered and entitled cause and objects to the Courts charge as follows:

(1) That the charge to the Court on prior offense of the Defendant is prejudicial and to allow the jury to consider the same is a denial of the Defendant's right to a fair and impartial trial and denial of due process of law under the constitution of the United States.

/s/ HOWARD O. LAKE  
HOWARD O. LAKE  
Attorney for Defendant  
405 Scanlan Building  
Houston 2, Texas CA 4-9249

ORDER—August 12, 1964

The above objections to the Court's Charge being this the 12th day of August, 1964, submitted and considered by the Court and the same is hereby overruled by the Court.

/s/ CHARLES SHERRILL  
Judge

Excepted To

/s/ HOWARD O. LAKE  
HOWARD O. LAKE  
Attorney for Defendant

[fol. 38]

IN THE DISTRICT COURT  
OF UPTON COUNTY, TEXAS  
112TH JUDICIAL DISTRICT

No. 304

[File Endorsement Omitted]

THE STATE OF TEXAS

v.

ROBERT A. BELL, JR.

JUDGMENT—August 21, 1964

This day this cause was called for trial, and the State appeared by her District Attorney and the defendant, Robert A. Bell, Jr., appeared in person, his counsel also being present, and both parties announced ready for trial, and the defendant, Robert A. Bell, Jr., in open court pleaded not guilty to the charge contained in the indictment herein, thereupon, a jury, to-wit:

A. J. McDonald, and eleven others, was duly selected, impaneled, and sworn, who, having heard the indictment read, the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court, and is here now entered upon the minutes of the Court, to-wit:

"We, the Jury, find the defendant guilty of robbery by assault, as charged in the first paragraph of the indictment herein, and we further find that each and all of the allegations set out in the second paragraph of the indictment herein, charging a final conviction for the offense of bank robbery, are true.

/s/ A. J. McDONALD, Foreman"



Whereas, his punishment if fixed by law as confinement in the state penitentiary for life

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court that the Defendant Robert A. Bell, Jr. is guilty of the offense of robbery by assault and a prior like offense as found by the jury and that he be punished by confinement in the State Penitentiary for life, and that the State of Texas do have and recover of the said defendant Robert A. Bell, Jr. all costs in this prosecution expended, for which let execution issue; and that the said defendant be remanded to jail to await the [fol. 39] further orders of the Court herein.

Entered this the 21st day of August, 1964.

/s/ CHARLES SHERRILL  
Judge Presiding.

[fol. 40]

IN THE DISTRICT COURT  
OF UPTON COUNTY, TEXAS

JUNE TERM, 1964

No. 304

[Title Omitted]

SENTENCE—August 21, 1964

This day this cause being again called, the State appeared by her County Attorney, and the defendant Robert A. Bell, Jr., accompanied by his attorney, Aubrey Edwards was brought into open Court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the \* Verdict of the Jury herein rendered and entered against him on a former day of this term. And thereupon the defendant Robert A. Bell, Jr. was asked by the Court whether he had anything to say why said sentence should not be pronounced against him and he answered nothing in bar

thereof. Whereupon the Court proceeded, in the presence of the said defendant Robert A. Bell, Jr. to pronounce sentence against him as follows:

It is the order of the Court that the defendant Robert A. Bell, Jr. who has been adjudged to be guilty of Robbery and whose punishment has been assessed by \* verdict of the Jury and the Laws of this State applied thereto at confinement in the penitentiary for Life, be delivered by the Sheriff of Upton County, Texas, immediately to the Director of Corrections of the Texas Department of Corrections, or other person legally authorized to receive such convicts, and the said Robert A. Bell, Jr. shall be confined in said penitentiary for a term of not less than 5 years nor more than Life in accordance with the provisions of the law governing the penitentiaries and the Texas Department of Corrections. And the said Robert A. Bell, Jr. is hereby remanded to jail until said Sheriff can obey the directions of this sentence.

/s/ Charles Sherrill, Judge  
112th Judicial District Court, Upton  
County, Texas

\* \* \* \*

[fol. 41]

IN THE DISTRICT COURT  
OF UPTON COUNTY, TEXAS  
112TH JUDICIAL DISTRICT

No. 304

[File Endorsement Omitted]

[Title Omitted]

BILL OF EXCEPTION No. 1—Filed September 28, 1964

BE IT REMEMBERED that upon the call of the foregoing cause for trial the Defendant filed a Motion to Quash the Indictment in said cause for the following reasons:

"That the indictment herein alleges as a part of the indictment the primary count of robbery by assault and

the prior conviction of the Defendant on another offense, and is prejudicial and inflammatory to the jury and precludes the Defendant from his constitutional right under the 6th amendment of the Constitution of the United States to be tried by a fair and impartial jury and likewise a denial of due process under the 5th and 14th amendments of the Constitution of the United States."

AND BE IT FURTHER REMEMBERED that the Court, in all things, overruled the Defendant's Motion and that the Defendant duly and timely, in open court, excepted to the ruling of the Court; and Defendant here, now, tenders this, his formal Bill of Exception No. 1, and requests that same be approved and ordered filed as a part of the record in this cause on appeal.

Respectfully submitted,

BULLOCK, KERR & SCOTT  
P. O. Drawer 1707  
Fort Stockton, Texas, 79735

/s/ THOMAS R. SCOTT

By: THOMAS R. SCOTT

Attorney For Defendant,  
ROBERT A. BELL, JR.

The above and foregoing Defendant's Bill of Exception No. 1, having been timely presented to me and having been by me submitted to the attorney for the State of Texas, and having been examined by me and found to truly reflect the matters and things therein complained of, transpired as therein recited, the same is hereby by me approved officially and ordered filed as a part of the record of this cause on appeal this 24 day of September, 1964.

/s/ CHARLES SHERRILL  
CHARLES SHERRILL  
District Judge

[fol. 42]

[Clerk's Certificate to foregoing transcript  
omitted in printing.]

[fol. 43]

## IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 37,655

ROBERT A. BELL, JR., APPELLANT

v.

THE STATE OF TEXAS, APPELLEE

Appeal from Upton County

OPINION—February 3, 1965

The offense is robbery by assault with a prior conviction for an offense of the same nature alleged for enhancement; the punishment, life.

Manager Wolfrum and Assistant Manager Ridgeway of Evans Foodway in McCamey testified that right at closing time at about 7:00 p.m. on the night in question appellant asked to be admitted to the store in order to purchase some milk and bread, but that after gaining entrance he robbed them of a sum of money in excess of one thousand dollars in bills and silver by exhibiting a gold plated pistol. Wolfrum identified the money bag containing the silver as belonging to his cash register No. 1.

Highway Patrolmen Barber and Hager testified that they were notified of the robbery, and at 7:30 p.m. on the same evening as they were preparing to set up a road block some 30 miles from McCamey, they observed a Chevrolet pass them, proceed a distance west, then turn around and start traveling east. They stated that they gave chase, clocked the Chevrolet's speed, found that it was exceeding the speed limit, stopped it and gave the appellant, its sole occupant, a speeding ticket. As they were talking to appellant they looked in the Chevrolet and saw a gold plated pistol lying on the front seat. Thereafter, they opened the doors and discovered Mr. Wolfrum's money bag full of coins and a large amount of currency lying loose on the floor board under the front seat. On the back seat they found a rifle, and two more were found in the trunk of the 1964 Chevrolet.

The prior conviction for robbery by assault was established.

Appellant did not testify but called his mother, who testified that he had been committed to a mental institution at one time and was in a severe emotional state at [fol. 44] the time of the robbery because he had not money, his wife was expecting a baby, and he was out of a job, and expressed the opinion that when he was in one of those emotional spells he did not know the difference between right and wrong.

Sheriff Echols testified that he had known appellant since his youth and had observed him daily and conversed with him many times during the eight months he had him in jail after the robbery and prior to the trial. He stated that in his opinion appellant was normal and knew the difference between right and wrong. He based his opinion on his observation of more than 50 mentally ill people confined in his jail during his tenure in office.

Deputy Sheriff Langford testified that he had observed appellant since he had been in jail, but had noticed nothing wrong with him mentally and expressed the opinion that he knew the difference between right and wrong on the night of his arrest and thereafter.

The sole question properly presented for review is the court's failure to quash the indictment because it contained the allegation of the prior conviction which appellant alleges precluded him from securing a fair and impartial jury. It is essential under Article 62, V.A.P.C., that the indictment charge the prior conviction in order for the State to prove the same.

Though not properly raised on appeal, we do observe that appellant did not elect to stipulate the prior conviction as this Court suggested in *Salinas v. State*, 365 S. W. 2d 362; *Pitcock v. State*, 367 S. W. 2d 864; *Ex Parte Reyes*, 383 S. W. 2d 804, and *McDonald v. State*, — S. W. 2d —, 37,050 (October 14, 1964).

Finding the evidence sufficient to support the conviction and no reversible error appearing, the judgment is affirmed.

MORRISON, Judge

(Delivered February 3, 1965)



[fol. 45]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S CERTIFICATE AS TO JUDGMENT AND OVERRULING  
OF APPELLANT'S MOTION FOR REHEARING—April 12, 1965

I, GLENN HAYNES, Clerk of the Court of Criminal  
Appeals of Texas, do hereby certify that in Cause No.  
37,655 styled:

ROBERT A. BELL, JR., APPELLANT

vs.

THE STATE OF TEXAS, APPELLEE

judgment of the 112th Judicial District Court of Upton  
County was affirmed, on February 3, 1965, Appellant's  
Motion for Rehearing overruled without written opinion  
on March 17, 1965 and mandate issued on March 19,  
1965.

Therefore, with the overruling of Appellant's Motion  
for Rehearing, this cause was disposed of by this Court  
on March 17, 1965, appellant having exhausted all reme-  
dies in this, The Court of Criminal Appeals of Texas and  
said judgment has now become final on the docket of this  
Court.

WITNESS my hand and seal of said Court, at office, in  
Austin, Texas, the 12th day of April, A.D. 1965.

/s/ Glenn Haynes  
Clerk

Court of Criminal Appeals of Texas

[fol. 46]

SUPREME COURT OF THE UNITED STATES

No. 128 Misc., October Term, 1965

ROBERT A. BELL, JR., PETITIONER

v.

TEXAS

On petition for writ of Certiorari to the Court of Criminal Appeals Court of the State of Texas.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN  
FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF  
CERTIORARI—January 31, 1966

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 968 and placed on the summary calendar.

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 969

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WILLIAM EVERETT REED, PETITIONER

vs.

GEORGE J. BETO, DIRECTOR,  
TEXAS DEPARTMENT OF CORRECTIONS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT

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## INDEX

	Original	Print
Record from the United States District Court for the Southern District of Texas		
Petition for writ of habeas corpus .....	1	1
Exhibit A—Affidavit of Glenn Haynes, Clerk of the Court of Criminal Appeals of Texas .....	5	5
Exhibit No. 1—Copy of opinion of Court of Criminal Appeals of Texas in Cause No. 36,003, <i>Ex parte Reed</i> .....	9	8
Exhibit No. 2—Copy of motion for rehearing in Cause No. 36,003 .....	10	9

Record from the United States District Court for  
the Southern District of Texas—Continued

Petition for writ of habeas corpus—Continued

Exhibit No. 3—Copy of application for writ of habeas corpus or writ of error coram nobis filed in Cause No. 36,003 .....	11	10
Exhibit No. 4—Copy of indictment in the record in Cause No. 33,987, <i>Reed v. State</i> ..	34	27
Exhibit No. 5—Copy of the Charge of the Trial Court from the record in Cause No. 33,987 .....	43	34
Exhibit No. 6—Copy of judgment in the record of Cause No. 33,987 .....	49	39
Exhibit No. 7—Copy of State's Exhibit No. 8, consisting of prior judgment of convic- tion in Cause No. 4561-IH, as reflected by the record in Cause No. 33,987 .....	51	41
Exhibit No. 8—Copy of State's remaining portion of State's Exhibit No. 8, consisting of prior sentence in Cause No. 4561-IH, to- gether with the Judge's and Clerk's certi- ficates, as reflected by the record in Cause No. 33,987 .....	52	42
Exhibit No. 9—Copy of transcript of portion of testimony pertaining to State's Exhibit No. 8 at the trial below .....	55	45
Exhibit No. 10—Copy of judgment and sen- tence in Cause No. 2781-BA, as reflected by the record in Cause No. 33,987 .....	56	46
Exhibit No. 11—Copy of portion of testimony appearing in Statement of Facts in Cause No. 33,987 .....	61	50
Exhibit No. 12—Copy of commitment papers of William Everett Reed in Cause No. 5201- H, with judgment and sentence in Cause No. 4561-IH attached, as reflected by the record in Cause No. 33,987 .....	61	50
Exhibit No. 13—Copy of portion of testimony appearing in Statement of Facts in Cause No. 33,987 .....	70	58
Motion to dismiss .....	73	60
Petitioner's brief in support of petition and in opposition to respondent's motion to dismiss .....	75	62

Record from the United States District Court for  
the Southern District of Texas—Continued

Appendix A—Copy of opinion of Court of Criminal Appeals of Texas on appellant's motion for rehearing in Cause No. 36,295, <i>Carso v. Texas</i> .....	93	74
Memorandum and order granting respondent's motion to dismiss and dismissing petition of William Everett Reed for writ of habeas corpus .....	94	75
Notice of appeal .....	98	78
Motion for certificate of probable cause .....	99	78
Court's notation on calendar sheet .....	100	79
Cost bond on appeal (cash) .....	100	80
Certificate of probable cause .....	101	81
Praeceptum for contents of record on appeal .....	102	81
Clerk's certificate (omitted in printing) .....	103	82
Proceedings in the United States Court of Appeals for the Fifth Circuit .....	104	82
Minute entry of submission .....	104	82
Opinion, Brown, J. ....	105	83
Judgment .....	111	87
Petition for rehearing .....	112	88
Order denying petition for rehearing .....	115	90
Clerk's certificate (omitted in printing) .....	116	90
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari .....	117	91





[fol. 1]

**IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION**

**No. 64-H-17, CIVIL**

**UNITED STATES OF AMERICA, EX REL.  
WILLIAM EVERETT REED, RELATOR,**

**vs.**

**DOCTOR GEORGE J. BETO, DIRECTOR OF TEXAS  
DEPARTMENT OF CORRECTIONS,**

**AND**

**STATE OF TEXAS, RESPONDENT**

**PETITION FOR WRIT OF HABEAS CORPUS—Filed:  
January 9, 1964**

**TO THE HONORABLE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF TEXAS,  
HOUSTON DIVISION:**

The petition of William Everett Reed respectfully shows:

**I.**

That he is a citizen of the United States of America and of the State of Texas.

**II.**

That he is at present unconstitutionally detained and imprisoned at the State Penitentiary of Huntsville, Texas, within the District for which this Court sits, by respondent Dr. George J. Beto, Director of Texas Department of Corrections and the State of Texas, by virtue of a judgment pronounced upon him on March 14, 1961 and by a sentence pronounced upon him April 11, 1961 by the 89th Judicial District Court for the County of Wichita, Texas, upon conviction of the offense of burglary, enhanced by the application of Article 63, Penal Code of the State of Texas.

[fol. 2]

## III.

That pursuant to the aforesaid judgment, he is detained by the Respondent, the Warden, at the aforesaid penitentiary for a term of life imprisonment under the provisions of Article 63 of the Penal Code of the State of Texas.

## IV.

That Petitioner has exhausted all State remedies, there being no further necessity to petition for certiorari to the United States Supreme Court under 28 U.S.C. sec. 2254. *Fay v. Noia*, — U.S. —, 9 L ed 837. The steps taken by Petitioner to exhaust the State remedies were as follows:

The Petitioner duly appealed to the Court of Criminal Appeals at Austin, Texas, said judgment of conviction being thereafter affirmed by opinion of such State highest appellate Court in an opinion delivered January 10, 1962. Thereafter Petitioner made application for Writ of Habeas Corpus to the aforesaid Court of Criminal Appeals, which relief was denied by such appellate's court in its opinion delivered June 29, 1963.

## V.

That Petitioner is restrained and imprisoned pursuant to a sentence that is illegal and void in that Petitioner was denied due process of law as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. The facts and circumstances under which the denial of Petitioner's constitutional rights took place are as follows:

- [fol. 3] (a) The assessment of the life sentence against Petitioner by virtue of the Habitual Criminal's Statute, Article 63 of the Penal Code of the State of Texas, without any evidence to support the same constitutes a violation of due process.
- (b) There being no legal evidence identifying the Petitioner as that person convicted in the two prior convictions alleged and proven, such evidence relied upon to identify the Petitioner, was in vio-

lation of Petitioner's constitutional right of confrontation as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

- (c). The reading of the allegations in the indictment pertaining to two prior convictions to the jury and the proof of two prior convictions to the jury prior to a determination of guilt by said jury of the primary offense of burglary deprived the Petitioner of his fundamental rights to a fair trial in violation of the Fourteenth Amendment to the Constitution of the United States.

#### VI.

The Petitioner, now having served a minimum time for the primary offense of burglary, the remaining punishment that he is now undergoing is excessive.

#### VII.

That no previous application to this Court has been [fol. 4] made for the Writ of Habeas Corpus on the grounds alleged herein.

#### VIII.

That the affidavit of Hon. Glenn Haynes, Clerk, Court of Criminal Appeals of Texas, attached hereto as Exhibit A to this petition, made a part hereof for all pertinent purposes, sets forth all of the record necessary for a determination of this matter and it would appear that there is no necessity that the Petitioner be brought before this Court unless this Honorable Court determines otherwise, Petitioner hereby expressly waiving his right to appear.

WHEREFORE, Petitioner prays:

1. That a Writ of Habeas Corpus be directed to the Respondent issued in his behalf.
2. That Respondent be required to appear and answer the allegations of this Petitioner.

3. That, after a full and complete hearing, this Court relieve Petitioner of the unconstitutional detention and imprisonment.
4. That the Court grant such other, further, and different relief as to the Court may seem just and proper under the circumstances.

/s/ WILLIAM EVERETT REED  
CHARLES W. TESSMER  
EMMETT COLVIN, JR.  
Attorneys for Petitioner  
Lawyers Building  
706 Main Street, Suite 400  
Dallas 2, Texas  
RI 8-3433 RI 7-5893

By /s/ EMMETT COLVIN, JR.

[fol. 5] [*Duly sworn to by William Everett Reed jurat omitted in printing (all in italics)*]



## EXHIBIT A TO PETITION FOR WRIT OF HABEAS CORPUS

THE STATE OF TEXAS  
COUNTY OF TRAVIS

Before me, John H. Johnson a notary public in and for Travis County, Texas, on this day personally appeared Glenn Hayes, who being by me here and now duly sworn, upon oath says:

The exhibits attached hereto are true and correct copies of the record in part taken in Cause Numbers 36,003, *Ex parte Reed* and 33,987, *Reed v. State*, 353 S.W. 2d 850. The complete record in both of said causes are within my care, custody and control as the Clerk of the Court of Criminal Appeals of the State of Texas, at [fol. 6] Austin, Texas.

A review of the record in Cause No. 33,987, 353 S.W. 2d 850 reflects that the Defendant, William Everett Reed, did not testify at the trial below and that he plead not guilty.

Exhibit No. 1 is a true and correct copy of the Opinion in Cause No. 36,003, *Ex parte Reed*, of the aforesaid Court of Criminal Appeals.

Exhibit No. 2 is a true and correct copy of the Motion for Rehearing in said Cause No. 36,003.

Exhibit No. 3 is a true and correct copy of the Application for Writ of Habeas Corpus or Writ of Error Coram Nobis filed in said Cause No. 36,003.

After the filing of the Writ, rendition of the Opinion, I can certify that in Cause No. 36,003 that on or about October 16, 1963 the Court of Criminal Appeals overruled the aforesaid Motion for Rehearing without written opinion.

Exhibit No. 4 is a true and correct copy of the Indictment in the record in Cause No. 33,987, *Reed v. State*, 353 S.W. 2d 850.

Exhibit No. 5 is a true and correct copy of the Charge of the Trial Court from the record in Cause No. 33,987, *Reed v. State*, 353 S.W. 2d 850.

Exhibit No. 6 is a true and correct copy of the judgment in the record of Cause No. 33,987, *Reed v. State*, 353 S.W. 2d 850.

Exhibit No. 7 is a true and correct copy of the State's [fol. 7] Exhibit No. 8, consisting of the prior judgment of conviction in Cause No. 4561-IH, introduced into evidence in the Trial Court as reflected by the record in said Cause No. 33,987.

Exhibit No. 8 is a true and correct copy of the State's remaining portion of State's Exhibit No. 8, consisting of the prior sentence in Cause No. 4561-IH together with the Judge's and Clerk's certificates introduced into evidence in the Trial Court as reflected by the record in said Cause No. 33,987.

Exhibit No. 9 is a true and correct copy of the transcript of the testimony at Page 109, Lines 14-24 and Page 110, Lines 1-17, as reflected by the record in said Cause No. 33,987, wherein the aforesaid exhibit, enumerated in the trial as State's Exhibit No. 8, was introduced into evidence as State's Exhibit No. 8 at the trial below. A review of the record reflects no further evidence pertaining to Exhibit Nos. 7 and 8 (State's Trial Exhibit No. 8).

Exhibit No. 10 is a true and correct copy of the Judgment and Sentence in Cause No. 2781-BA, introduced into evidence in the Trial Court below as reflected by the record in said Cause No. 33,987 (said record of prior judgment and sentence of conviction being designated in the Trial Court below as State's Exhibit No. 16).

Exhibit No. 11 is a true and correct copy of the testimony appearing in the Statement of Facts in said Cause No. 33,987 at Page 122, Lines 1-19 wherein said Exhibit [fol. 8] 10 (designated as State's Exhibit No. 16 in the Trial below) was introduced into evidence.

Exhibit No. 12 is a true and correct copy of the commitment papers of William Everett Reed in Cause No. 5201-H, with Judgment and Sentence in Cause No. 4561-IH attached, which commitment papers were offered in evidence in the trial below, as reflected by the record in Cause No. 33,987, as State's Exhibit No. 10, as is further reflected by the attached exhibit set forth in the next paragraph hereto.

Exhibit No. 13 is a true and correct copy of the testimony appearing in the Statement of Facts of Cause No. 33,987, at page 112, lines 17-25; page 113, lines 1-25;

page 118, lines 3-25; page 119, lines 1-10; page 114, lines 1-11 (wherein exhibit designated in this affidavit as Exhibit No. 12 was introduced into evidence and identity established fingerprint comparison before the jury). A review of the record in said Cause No. 33,987 reflects that identity was established in the trial court before the jury solely by the testimony in this Exhibit No. 13 and the introduction of the commitment papers with attachments resigned in this affidavit as Exhibit No. 12.

/s/ GLENN HAYNES  
GLENN HAYNES, Clerk, Court of  
Criminal Appeals of Texas

Subscribed and sworn to before me, by the said Glenn Haynes, this 31st day of December, 1963, to certify which witness my hand and seal of office.

[fol. 9] My commission expires June 1, 1965.

/s/ H. S. STEINLE  
Notary Public in and for Travis  
County, Texas

(SEAL)

## AFFIDAVIT EXHIBIT No. 1

No. 36,003.

EX PARTE

Original Application

William Everett Reed

## OPINION

Petitioner by writ of habeas corpus attacks as void his confinement under a sentence for burglary, with two prior convictions alleged for enhancement under Article 63, V.A.P.C., alleging that he has served the minimum term provided for burglary and that the proof did not correspond to the allegations in the indictment as to the number of the court in which the prior convictions were had. Appellant's appeal from this conviction is reported as Reed v. State, 353 S.W. 2d 850.

This is not a new contention and has been answered adversely to appellant in Ex parte Seymour, 128 S.W. 2d 46; Ex parte Wingfield, 282 S.W. 2d 219; and Ex parte Sistrunk, 349 S.W. 2d 728.

Ex parte McVickers, 176 P. 2d 40, by the Supreme Court of California, upon which appellant relies, announced no rule of law different from that employed by this Court in Ex parte Puckett, 310 S.W. 2d 117. There, we said that one of the prior convictions relied upon [fol. 10] for enhancement was not, as a matter of law, an offense which was denounced by the laws of Texas as a felony.

The method of proving appellant's identity as being the person theretofore convicted as approved by this Court is Broussard v. State, 363 S.W. 2d 143, does not violate his right of confrontation as guaranteed by the Constitution.

The relief prayed for is denied.

MORRISON, Judge

(Delivered June 29, 1963)

## AFFIDAVIT EXHIBIT No. 2

IN THE COURT OF CRIMINAL APPEALS  
AT AUSTIN, TEXAS

No. 36,003

STATE OF TEXAS

vs

WILLIAM EVERETT REED

## MOTION FOR REHEARING

Now comes the Petitioner in the above styled and numbered cause and moves the Court to set aside the Judgment of Affirmance rendered June 29, 1963, and to grant this Motion for Rehearing and order Petitioner discharged from the Texas Department of Corrections.

Petitioner would respectfully point out that the Court erred in holding that Petitioner's incarceration in prison for life without record evidence to support said judgment did not violate the fourteenth amendment of the Federal Constitution of the United States of America.

[fol. 11] Petitioner further requests that this Honorable Court clarify the original Opinion so that there will be no question as to the decision rendered with reference to the due process clause of the Fourteenth Amendment of the United States Constitution.

WHEREFORE, premises aforesaid, Defendant prays that the Court grant this Motion and issue the writ of habeas corpus as prayed for in the Petition.

/s/ CHARLES WILLIAM TESSMER  
Lawyer's Building  
706 Main Street  
Dallas 2, Texas

Received in the Court of Criminal  
Appeals, Austin, Texas  
Jul 10, 1963  
Glenn Haynes, Clerk



AFFIDAVIT EXHIBIT No. 3

IN THE COURT OF CRIMINAL APPEALS  
FOR THE STATE OF TEXAS

No. 36,003

EX PARTE WILLIAM EVERETT REED

vs

DR. GEORGE J. BETO, DIRECTOR OF TEXAS  
DEPARTMENT OF CORRECTIONS AND  
STATE OF TEXAS, RESPONDENT

APPLICATION FOR WRIT OF HABEAS CORPUS OR  
WRIT OF ERROR CORAM NOBIS

"THE STATE HAVING WHOLLY FAILED TO  
ESTABLISHED BY THE EVIDENCE THE TWO  
[fol. 12] PRIOR CONVICTIONS RELIED UPON TO  
ENHANCE RELATOR'S PUNISHMENT TO LIFE  
IMPRISONMENT IN THE PENITENTIARY, AND  
RELATOR HAVING SERVED THE MINIMUM PUN-  
ISHMENT ASSESSABLE FOR THE PRIMARY OF-  
FENSE ALLEGED IN THE INDICTMENT, IN NOW  
ENTITLED TO HIS DISCHARGE FROM CUSTODY."  
EX PARTE BURCH, 267-2-560.

/s/ CHARLES W. TESSMER  
Attorney for Plaintiff

IN THE COURT OF CRIMINAL APPEALS  
FOR THE STATE OF TEXAS

No. \_\_\_\_\_

EX PARTE WILLIAM EVERETT REED

vs

DR. GEORGE J. BETO, Director of Texas Department  
of Corrections and

STATE OF TEXAS, RESPONDENT

ORIGINAL APPLICATION FOR THE WRIT OF  
HABEAS CORPUS OR WRIT OF ERROR CORAM  
NOBIS

MAY IT PLEASE THE COURT:

By this application for the writ of habeas corpus, or other relief, Relator William Everett Reed, seeks his outright discharge from the custody of the warden of the Department of Corrections of this State, where and by whom he is now unlawfully confined and deprived of his liberty.

It is Relator's contention that he has fully served all punishment lawfully assessed against him under the judgment [fol. 13] whereby it is claimed that he should be kept in prison and custody.

Relator's contention is fully set out in the statement and argument attached to this writ to which reference is here made, and which is made a part of this application.

All facts relied upon by the Relator to sustain his contention are taken from and are to be found in the record of the case before this Court, No. 33987, wherein William Everett Reed is Appellant and the State of Texas, Appellee, appealed from the District Court of Wichita County, Texas which was in all things affirmed by this Court. Such being true, no necessity exists to introduce any evidence in support of the application.

Wherefore, Relator prays that this Court issue its writ of habeas corpus and, upon final hearing, he be

discharged from the custody of the Department of Corrections of this State.

WILLIAM EVERETT REED

Subscribed and sworn to before me this) 10th day of May, 1963.

SAM N. BOLES  
Notary Public Walker Co., Texas

[fol. 14]

IN THE COURT OF CRIMINAL APPEALS  
FOR THE STATE OF TEXAS

No. \_\_\_\_\_

EX PARTE WILLIAM EVERETT REED

vs

DR. GEORGE J. BETO, Director of Texas Department  
of Corrections and

STATE OF TEXAS, RESPONDENT

STATEMENT FROM THE RECORD AND ARGUMENT  
SUPPORTING RELATOR'S APPLICATION  
FOR THE WRIT OF HABEAS CORPUS

STATEMENT

Relator was on the 14th day of March, 1961, convicted in cause No. 11,416-C in the District Court of Wichita County, of the primary offense of burglary, with two prior convictions of ordinary felonies. His punishment was assessed at confinement in the penitentiary of this state for life. From that conviction an appeal was perfected to the Court of Criminal Appeals, and became No. 33987, upon the docket of said Court. The conviction was duly affirmed by said Court and appears as *Reed v. State*, 353 S.W. 2d 850. Relator was subsequently

taken into custody and delivered to the penitentiary of this state, and began the service of the sentence imposed. He has not served on that sentence a total of two (2) years and twenty-two (22) days, as shown by the certificate of the Department of Corrections of this state which is attached hereto and made a part hereof, and dated April 25, 1963.

It is Relator's contention that the only valid punishment authorized to be assessed against him under the [fol. 15] record in that case, was the minimum punishment of two (2) years confinement in the penitentiary, for the crime of burglary, and that the assessment of a punishment of life in the penitentiary is wholly null and void and utterly without support by the testimony.

### ARGUMENT

The two prior convictions relied upon to enhance the punishment to life imprisonment as an habitual offender, were alleged as follows:

Count No. 2 charged that Appellant had been on the 15th day of March, 1954, convicted in the Criminal District Court No. 2, of Dallas County, Texas, in cause No. 4561-H, upon the docket of that Court, of felony theft. To sustain that allegation, the state relief upon and introduced in evidence a certified copy of a judgment and sentence rendered in the Criminal District Court No. —, Dallas County, No. 4561-H, upon the docket of that Court, which judgment follows the usual form applied in pleas of guilty in felony cases before the Court and without the intervention of a jury. The punishment assessed was ten (10) years confinement in the state penitentiary. What Relator especially points out is that nowhere in said judgment do we find any reference to Criminal District Court No. 2 of Dallas County, Texas, as charged in the indictment. There is nothing in said judgment or the caption thereof which shows that the judgment was rendered in Criminal District Court No. 2 of Dallas County, Texas. To the contrary, all reference to the Court rendering the judgment is that of Criminal District Court

[fol. 16] No. — of Dallas County. There is, therefore, a fatal variance between the judgment alleged in the indictment and that relied upon to sustain that allegation.

The sentence passed upon the judgment, shows to have been printed upon a single sheet of paper with the judgment and follows on that single sheet of paper the judgment. The sentence is in the usual form, provided by law. Other than to a reference that the sentence was being pronounced in open Court, there is no reference whatsoever to the fact that the sentence was being passed in and as being the sentence of the Criminal District Court No. 2 of Dallas County, Texas.

There is no question but that the judgment and sentence showed that it was rendered in the Criminal District Court No. —, Dallas County.

That certificate to the judgment and sentence, corroborated the above statement. That certificate was made by Bill Shaw, the Clerk of the Criminal District Courts of Dallas County, Texas, who certified that the judgment and sentence "is a true and correct copy of the judgment and sentence of the court rendered and entered in the case of The State of Texas vs. William Everett Reed, No. 4561-IH, as the same appears of record in Book 38, page 574, minutes of the court". WHAT COURT? The Criminal District Court of Dallas County, Texas, of which Bill Shaw was the Clerk. Moreover, the certificate of Judge Henry King attached to the certified copies, certifies that Bill Shaw is the Clerk of the Criminal District [fol. 17] Courts of Dallas County, Texas.

It is, therefore, shown without contradiction, that the State of Texas, not only wholly failed to prove the allegation of former conviction as alleged in the indictment, but proved a former conviction in another and different Court.

This Court judicially knows that there is a Criminal District Court of Dallas County, Texas, and a Criminal District Court No. 2 of Dallas County, Texas, because each Court is created by statute and is separate and distinct from each other. Article 52, C.C.P.

Such being true, there is no place here for an application of the rule on intent, that is that the state intended to allege in the indictment that the judgment and sen-



tence were rendered in the Criminal District Court No. 2 of Dallas County, Texas, or that the Clerk in certifying to the judgment and sentence was in error, and intended to certify to the judgment and sentence as having been rendered in Criminal District Court No. 2, rather than in the Criminal District Court of Dallas County, Texas.

The state in the trial of the case against Relator just failed to prove the allegations of the indictment as to Relator's prior conviction as alleged in the Second Count of the indictment.

The second prior conviction upon which the state relied to enhance Relator's punishment as an habitual offender, was set out as the "Eighth Count" of the indictment as certified by the Clerk of the District Court of Wichita County, Texas, in the amended transcript, certified [fol. 18] to by him on the 22nd day of December, 1961. This is called to the Court's attention because the verdict of the jury expressly found that Relator was guilty of the prior conviction alleged in the second and tenth counts of the indictment. There was no tenth count in the indictment which the Clerk certified to on the date above mentioned. It is impossible, therefore, to ascertain from the verdict of the jury of what the jury found Relator had been convicted in the tenth count of the indictment.

But, be that as it may, the second prior conviction upon which the state relied in the eighth count, alleged that Relator had been convicted on the 20th day of June, 1947, in case No. 2781-BA in said Court of an ordinary felony.

These certified copies of the judgment and sentence offered in evidence to support that allegation, are in the exact situation as those under the second count. There is an utter absence of any proof that the judgment and sentence was rendered in the Criminal District Court No. 2 of Dallas County, Texas, as alleged in the indictment. All the instruments show that the judgment and sentence there certified, were rendered in the Criminal District Court of Dallas County, Texas. A complete variance between the allegations and the proof as to the second prior conviction relied upon is shown. We will not burden the Court with again pointing out wherein the certified copies refer to the Criminal District Court of Dallas County,

[fol. 19] Texas, but content ourselves with saying that they are the same as pointed out heretofore in discussing the first prior conviction relied upon.

The state in the trial of this Relator in the District Court of Wichita County, Texas, did not prove that Relator has been twice, therefore, convicted on ordinary felonies as alleged in the indictment, and the judgment and sentence in that case insofar as it decrees Relator to be an habitual offender and assessing his punishment at confinement is absolutely and utterly void.

Relator, having now served on that sentence two (2) years and twenty-two (22) days which is in excess of the minimum punishment authorized to be assessed for the crime of burglary as charged in the primary offense, is entitled to his discharge from any further custody under that judgment and sentence.

### LAW OF THE CASE

Where allegation of indictment of prior conviction for the purpose of enhancing punishment stated that conviction had been had in certain District Court, and proof showed conviction in another District Court, there was a variance between the allegations and proof which was fatal to the conviction. For this variance constituted fundamental error and was properly inquired into by the Court of Criminal Appeals without Bill of Exceptions. *Corley v. State*, 254 S.W. 2d 394, and cases there cited. The *Corley* case involved an appeal from Dallas County and a discrepancy in the charge and the indictment and [fol. 20] the proof involving the same Court as the case at bar. The result of this situation is that actually there was *no evidence* to support a judgment and sentence of life in the penitentiary. In *Ex Parte Lyles*, 323 S.W. 2d 950, Judge Woodley recognized that a collateral attack by habeas corpus may be made upon a judgment on the basis of no evidence. Judge Woodley stated:

"The distinction between a collateral attack upon the conviction on a plea of guilty before the court because no evidence was introduced, and a similar attack upon the judgment upon the contention that the

evidence introduced and upon which the trial judge based his judgment was insufficient to show the guilt of the defendant, was pointed out by Judge Davidson in his dissent in *Ex Parte Keener*, 314 S.W. 2d 93, *supra*.

It is obvious that the situation here presented is one of no evidence as that there was one of insufficient evidence. In *Ex Parte Burch*, 267 S.W. 2d 560, it was there held that a prosecution under Article 63 of the Penal Code does not create an offense of being an habitual criminal but is only an enhancement statute. In other words, it is a condition where an excess of punishment may be assessed upon proper evidence.

The rule as stated in *Corpus Juris Secundum*, Volume 39, habeas corpus, Section 26, Subsection I, is as follows:

### EXCESSIVE SENTENCE

In case of an excessive sentence, by waiver of authority [fol. 21] ty, as much of the sentence as is excessive may be relieved against on a habeas corpus, after the valid part thereof has been served or satisfied. Such relief cannot be obtained from an oppressive or unduly severe sentence, which is still within statutory limits. (citing cases)

The foregoing rule is recognized in *Ex Parte Pruitt*, 141 S.W. 2d 333, Judge Hawkins speaking for the Court as presiding Judge, stated at page 335:

"Relator may bring himself within the rule announced in 76 A.L.R. at page 476, as follows: "In the case of a sentence which is merely excessive it seems to be well settled, with the exception of a few early cases, that if the court had jurisdiction of the person and subject-matter of the offense, such sentence is not void ab initio because of the excess, but that it is good so far as the power of the court extends, and is invalid only as to the excess, and therefore a person in custody under such sentence cannot be discharged on habeas corpus until he has suffered or performed so much of it as it was within the power of the court to impose. In addition to a few other cases set out in the annotation which apparent-

ly support this rule, the following show that the rule is well settled." "

## 5

"Here follows citation of many cases from the Fed- [fol. 22] eral courts, and also from thirty-seven state appellate courts, among them being *Ex parte Ellerd*, 71 Tex. Cr. R. 285, 158 S.W. 1145, Ann. Cas. 1916D, 361."

Judge Hawkins went on to point out that Relator's application for habeas corpus was premature as he had not served the valid part of his sentence which could have been assessed. The writ of habeas corpus was denied without prejudice to the Relator's right to represent the matter for further consideration when he had brought himself within the above quoted rule.

The attention of the Court is invited to the following cases involving prosecution for enhanced punishment under the habitual criminal statute.

*Ex parte Daniels*, 252 S.W. 2d 586, in a habeas corpus proceeding it was held that indictment which was insufficient to charge commission of third offense because it was alleged that third offense was not committed subsequent to second offense, it was held that the punishment was excessive and that Defendant having served a period of time in excess of that provided for second offenders would be *discora* habeas corpus.

*Ex parte Huff*, 316 S.W. 2d 896, a habeas corpus proceeding, was held that where two prior convictions were secured in the same Court on the same date, they could not be used as a basis for prosecution as a third offender in subsequent prosecution. The writ of habeas corpus was granted because neither conviction could have preceded the other to constitute relator a third offender. Relator [fol. 23] was ordered discharged from the penitentiary.

In *Ex parte Puckett*, 310 S.W. 2d 117, it was held that where enhancement of sentence of Relator because of prior conviction in Federal Court was invalid, and Relator had served the maximum term for the second offense of felony theft, he was entitled to the discharge on his application for writ of habeas corpus. The Court in this



case was not only considering the sufficiency of the indictment which alleged a conviction for the National Motor Vehicle Theft Act in Federal Court, but was also considering the question of no evidence to show a conviction for a felony useable under Article 63 of the Penal Code. Judge Woodley stated:

"We need not rest our decision upon these authorities alone. If one who violates the National Motor Vehicle Theft Act would, if the act had been committed in Texas, be guilty of receiving stolen property under laws of this state also, he would not, unless the value of the automobile was \$50 or more, be guilty of a felony."

The Court went on to hold that the allegations of the indictment were insufficient to sustain a life sentence. Judge Woodley further stated:

"There is no question but that this Court has the power and authority to prevent the enforcement of a judgment obtained under circumstances which constitute a denial of due process. *Ex parte McCune*, 156 [fol. 24] Tex. Cr. R. 213, 246 S.W. 2d 171."

The Relator in the *Puckett* case was ordered discharged under authority of *Ex parte Daniels*, 252 S.W. 2d 586 and *Ex parte Pruitt*, 141 S.W. 2d 333.

Relator Reed has brought himself squarely within the excessive punishment rule and having served the minimum term that could legally have been assessed under the admissible evidence, that is, two (2) years for the primary offense of burglary since the jury returned no verdict assessing the term of years, he is entitled to his discharge. *Ex parte Erwin*, 170 S.W. 2d 226; *Ex parte Rolen*, 294 S.W. 2d 403; *Ex parte Goss*, 262 S.W. 2d 412; *Ex parte Castleberry*, 216 S.W. 2d 584; *Ex parte Lindsey*, 331 S.W. 2d 320. Petitioner would point out, however, that Judge Morrison's dissent in *Ex parte Goss* does not touch the case at bar because the dissent that a life imprisonment verdict in a robbery with firearms case should be construed as a term of years to bring the punishment within the robbery with firearms statute.



This is not the case as presented before this Court here and now.

The rule is well settled that where there is no evidence of guilt (no evidence to support the allegation of indictment as to the enhancement statute, Article 63, D.C.) the judgment assessing a life sentence under the enhancement statute is excessive and said excess may be inquired of by habeas corpus after the valid portion of the sentence has been served. *Corpus Juris Secundum*, Vol. 39, habeas corpus, section 226, subsection E, *Ex parte Pruitt*, 141 [fol. 25] S.W. 2d 333, *Ex parte Puckett*, 310 S.W. 2d 117.

The modern rule followed by majority of the states with reference to excessive punishment under the enhancement or habitual criminal statute is discussed in the case of *In Re McVickers* (1946) 29 California, 2d, 264, 176 Pacific 2d, 40. The case held that an adjudication that an offender is an habitual criminal within the meaning of the California statute not to be an element of adjudicated guilt nor a part of the judgment of the conviction, and hence reaches the result that no violence is done to the finality of the judgment of conviction for the primary offense by permitting a collateral attack on the determination as to a prior conviction. So, where proof in habeas corpus proceedings to secure the release of the Petitioner from custody showed that Petitioner was a habitual criminal who had been previously convicted of felonies enumerated in the habitual criminal statute twice, but not three times, one of the convictions constituting only a misdemeanor by California law, was held that the Petitioner was entitled to be accorded the benefits as well as the penalties of the law applicable to persons who had suffered two, rather than three, prior convictions. The Court said that the writ of habeas corpus would lie to review and ancillary adjudication of habitual criminality which was unsupported by the evidence as a matter of law and that the use of the writ for this purpose is not subject to the objection that thereby the writ is made a writ of error to review the judgment of conviction, or that it constitutes an unjustified collateral attack on such judgment, since an adjudication of the habitual criminal status is not a judgment or con-

viction, but involves merely a determination of certain facts which operate to prolong the confinement of the prisoner and limit his right to parole.

This same rule has been followed by this Court in *Ex parte Burch*, 267 S.W. 2d 560, which held that an adjudication of guilt in the enhancement statutes are used does not create an offense of being an habitual criminal. Therefore, the collateral attack by habeas corpus is not upon the judgment of guilt with reference to the primary offense but only as to the enhancement feature of the case which would render a judgment in the case at bar excessive. Petitioner would further point out that this case having heretofore been before this Honorable Court on appeal in *William Everett Reed v. The State of Texas*, — S.W. 2d —, cause number —. This Court would judicially know that there was no evidence introduced to support the enhancement feature of this case and would thus deprive Petitioner of his liberty without due process of law. In *Le Fors v. State*, 278 S.W. 2d 837, on rehearing opinion by Judge Woodley, it was there held that this Court would judicially know this the fact that a prior conviction used for enhancement was a final conviction and that the mandate had been issued by the Court of Criminal Appeals on a conviction occurring several years previous to the prosecution. Thus, the Court of Criminal Appeals referred to its own records of the ap-[fol. 27] peal of the prior case of *Leforis v. State*, 148 S.W. 2d 201, to establish that the prior conviction alleged in the later case of *Le Fors v. State*, 278 S.W. 2d 837, was in fact a final judgment which could be used to enhance the penalty in the later case.

A judgment may be attacked by habeas corpus if matters alleged in the attack are such as, if true, the Trial Court would have been without jurisdiction either in the person of the Relator or the subject matter, or to render the particular judgment, that is life imprisonment, because no evidence was adduced to support said judgment and, therefore, the judgment is excessive beyond the minimum penalty for the primary offense of burglary which would have been two (2) years. Presiding Judge Woodley speaking in *Ex parte Puckett*, 310 S.W. 2d 117, stated:

"There is no question but that this Court has the power and authority to prevent the enforcement of a judgment obtained under circumstances which constitute a denial of due process. Ex parte McCune, 156 Tex. Cr. R. 213, 246 S.W. 2d 171."

A conviction of a criminal offense by State Court based upon no evidence constitutes a violation of due process of law. *Thompson v. City of Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654; *Garner v. Louisiana*, 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207; and *Taylor v. Louisiana*, 370 U.S. 154, 82 S. Ct. 1188. Therefore, the failure of the state in the case at bar to introduce any evidence to prove the obligation of the indictment that [fol. 28] Petitioner had been convicted in the particular Court alleged constitutes an imprisonment of Petitioner without due process of law as to the excessive punishment.

### CLOSING

Petitioner has observed the minimum term for the primary offense of burglary and the remaining punishment that he is now undergoing is excessive. The question of excessive punishment may be attacked collaterally by a writ of habeas corpus. This is true under existing Texas law without reference to the California rule heretofore discussed as followed in *Chandler v. Fretag*, 348 U.S. 3, 75 S. Ct. 1, wherein it was held that hearing on charge of being an habitual criminal and trial of felony charge may be conducted in a single proceeding, they are essentially independent of each other. The assessment of the life sentence against Petitioner by virtue of the Habitual Criminal Statute, Article 63 P.C., without any evidence to support same constitutes a violation of due process and may be raised collaterally on writ of habeas corpus.

Therefore, the case at bar constitutes one where Appellant is not attacking the validity of the primary offense of burglary and the judgment of conviction based thereon, but is attacking the excess punishment rendered against him without any evidence introduced. Under the *McCune*

and *Puckett* rule, a conviction obtained in violation of due process of law is reviewable on writ of habeas corpus by the Texas Court of Criminal Appeals. In *Ex parte Lyles*, [fol. 29] this Court is recognized that a conviction without evidence as opposed to one based on insufficient evidence raises a due process of law question. Under the *Corley* rule and cases there cited, a fatal variance in proof as to the allegations of previous conviction have the same force in effect as if no evidence was introduced to support the allegations for enhancement in the indictment. This creates an analogy to *Ex parte Puckett*, *Ex parte Scafe*, *Ex parte Daniels*, and *Ex parte Huff*. In all of the aforementioned writ of habeas corpus cases, the judgment itself was not void on its fact but said conclusion was reached from an examination of the pleadings or evidence adduced to support said judgment. A judgment may be attacked as void by habeas corpus if matters alleged in the attack is such as, if true, the Trial Court would have been without jurisdiction either of the person, of the Realtor, or of the subject matter, or to render the particular judgment. *Ex parte Cain*, 217 S.W. 386, In the case at bar, the Trial Court was without power to render a judgment of life imprisonment because there was no evidence introduced to support said judgment. The Petitioner having served the minimum sentence for the primary offense is entitled to his discharge from further confinement of restraint by authority *Ex parte Rola*, 294 S.W. 2d 403, citing *Ex parte Goss*, and *Ex parte Erwin* and in this connection see also *Ex parte Castleberry*, 216 S.W. 2d 584.

It is, therefore, respectfully submitted that Petitioner's [fol. 30] further confinement is in violation of due process of law and that this Honorable Court should issue and grant the writ of habeas corpus as prayed for and order Petitioner discharged from the Texas Department of Corrections forthwith.

If it be conceded that the state proved the two prior convictions as alleged, then:

**"THERE IS NO LEGAL EVIDENCE IDENTIFYING THE RELATOR AS THAT CONVICT."**



The evidence relied upon to identify the Relator, was in violation of Relator's constitutional right of confrontation as guaranteed by Sec. 10 of Article 1, of the Constitution of Texas, and the 6th Amendment to the Constitution of the United States and, which violation by a State Court constitutes to Relator, a violation of due process as guaranteed by the 14th Amendment to the Constitution of the United States.

By the unlawful and illegal testimony relied upon to support the identification of Relator as the prior convict, definitely raises the federal question that Relator has been denied due process of law in obtaining this conviction, insofar as the prior convictions are concerned.

Now did the state identify the Relator as the prior convict?

To sustain the allegation that the Relator was the one and same *persoToasuconvited* on the 15th day of March, 1954, in the Criminal District Court No. 2 of Dallas [fol. 31] County, Texas, in cause No. 4561-IH as alleged in the second count of the indictment, the certificate of J. C. Roberts, Record Clerk of the Texas Department of Corrections, to which he attached (1) a photograph, (2) fingerprints, (3) commitments, of the originals of record in his office, of William Everett Reed, No. 138706.

The commitments referred to were the same as the judgment and sentence the state has used in evidence as heretofore pointed out. The fingerprints, purported to be those of William Everett Reed, as was the photograph.

With the fingerprints so certified, a fingerprint expert based upon a comparison therewith known fingerprints furnished from the Department of Corrections were those of the Relator. It was upon this testimony, alone, that the state relied to identify the Appellant as being the one and same person as was convicted in the Criminal District Court No. 2 of Dallas County, Texas, as alleged.

All this identifying evidence was received over the objection of Relator's counsel.

The same procedure was employed in identifying by fingerprints the Relator as the convict alleged to have been convicted in the Criminal District Court No. 2 of Dallas County, Texas, on the 20th day of June, 1947, in



cause No. 2781-BA on the docket of said Court as charged in the eighth count of the indictment.

The proof relied upon by the state is the same procedure approved in numerous Texas cases, chief among which [fol. 32] is that of *Davis v. State*, 321 S.W. 2d 873, over a dissenting opinion expressing the view that the evidence violated the constitutional guarantee of confrontation. In none of those cases wherein the procedure was approved did the Court of Criminal Appeals pass upon the constitutionality thereof, as against the contention of a violation of the guarantee of confrontation.

The Supreme Court of the United States nor any of the other Courts of Federal jurisdiction approved the procedure, especially against the contention of a violation of the constitutional guarantees of confrontation.

Relator, therefore, presents the question here and insists that the evidence identifying him as the prior convict as alleged in the indictment violated the guarantee of both the State and Federal Constitution as heretofore pointed out, and especially the violation of the 6th Amendment by a State Court which constitutes to this Appellant a denial of due process under the 14th Amendment to the Constitution of the United States.

In conclusion it is respectfully submitted that by no process of reasoning, may it be said that upon the trial of the case against the Relator, in which he was assessed a punishment of life imprisonment as an habitual offender with punishment assessed at life imprisonment in the penitentiary, the state proved that the Relator was the convict who had been convicted of the offenses and in the Courts alleged in the indictment.

Relator was properly and legally convicted the primary [fol. 33] offense of burglary as alleged on the first count of the indictment (*Owens v. State*, 283 S.W. 2d 749), and the jury not having fixed the punishment for the violation of that offense, Relator is entitled to be discharged having served the minimum punishment affixed by statute for such primary offense.

Wherefore, Relator respectfully prays that he be discharged from custody of the Texas Department of Cor-

rection where he is now held and deprived of his liberty in violation of the law.

Respectfully submitted,

CHARLES W. TESSMER  
706 Main Street  
Lawyers Building  
Dallas 2, Texas

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IN THE COURT OF CRIMINAL APPEALS  
FOR THE STATE OF TEXAS  
AT AUSTIN, TEXAS.

No. \_\_\_\_\_

EX PARTE WILLIAM EVERETT REED

ORDER

On this \_\_\_\_\_ day of \_\_\_\_\_, 1963, came on to be heard Petitioner's Original Application for Writ of Habeas Corpus and Petitioner's Application is ordered filed by the Clerk of this Court and the cause will be set down for hearing to determine whether the Writ of Habeas Corpus shall issue or not.

Entered this \_\_\_\_\_ day of \_\_\_\_\_, 1963.

\_\_\_\_\_  
Judge, Court of Criminal Appeals

\_\_\_\_\_  
Judge, Court of Criminal Appeals

\_\_\_\_\_  
Judge, Court of Criminal Appeals

[fol. 34]

## AFFIDAVIT EXHIBIT No. 4

## INDICTMENT IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURORS for the County of Wichita, State aforesaid, duly organized as such at the January Term, A.D. 1961, of the 89th District Court for said County upon their oaths in said Court present that WILLIAM EVERETT REED, hereinafter called defendant, on or about the 14th day of March, A.D., 1960, and anterior to the presentment of this indictment, in the County of Wichita and State of Texas, did then and there unlawfully, by force, threats and fraud, break and enter a house there situated and occupied and controlled by one Ernest Guffey, hereinafter called owner, without the consent of said owner, then and there with the intent of said Defendant fraudulently to take, steal and carry away from and out of said house the corporeal personal property then and there in said house belonging to said owner, from the possession of said owner, without the consent of the said owner of the said corporeal personal property, with the intent to deprive the said owner of the value thereof and with the intent to appropriate the same to the use and benefit of him, the said Defendant.

SECOND COUNT: AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present that prior to the commission of the offense set out in the First Count of this indictment by the said William Everett Reed, he, the said William Everett Reed, was duly and legally convicted of a felony less than capital, to-wit, on the 15th day of March, 1954, in the Criminal District Court No. 2 of Dallas County, Texas, in a [fol. 35] case in said Court numbered 4561-IH and entitled The State of Texas vs. William Everett Reed, the said William Everett Reed was duly and legally convicted of an offense of the same nature as that hereinbefore charged against him in this cause, to-wit, theft of corporeal personal property of the value of \$50.00 or over, a felony less than capital, and said conviction occurred and the judgment thereon became final prior to the com-

mission of the offense hereinabove alleged in and by the First Count of this indictment upon an indictment then legally pending in said last named Court, of which the said Court had jurisdiction; said conviction was, and it is, a final conviction; and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. 4561-IH, in the Criminal District Court No. 2 of Dallas County, Texas, under the name of William Everitt Reed.

**THIRD COUNT: AND THE GRAND JURORS AFORESAID**, upon their oaths aforesaid, do further present that prior to the commission of the offense set out in the First Count of this indictment by the said William Everett Reed, he, the said William Everett Reed, was duly and legally convicted of a felony less than capital, to-wit, on the 15th day of March, 1954, in the Criminal District Court No. 2 of Dallas County, Texas, in a case in said Court numbered 5201-H and entitled The State of Texas vs. William Everitt Reed, the said William Everett Reed was duly and legally convicted of an offense of the same nature as that hereinbefore charged against him in this cause, to-wit, burglary, a felony less than [fol. 36] capital, and said conviction occurred and the judgment thereon became final prior to the commission of the offense hereinabove alleged in and by the First Count of this indictment upon an indictment then legally pending in said last named Court, of which the said Court had jurisdiction; said conviction was, and it is, a final conviction was, and it is, a final conviction; and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. 5201-H, in the Criminal District Court No. 2 of Dallas County, Texas, under the name of William Everitt Reed.

**FOURTH COUNT: AND THE GRAND JURORS AFORESAID**, upon their oaths aforesaid, further present that prior to the commission of the offense as set out in the First Count of this indictment by the said William Everett Reed, he, the said William Everett Reed, was duly and legally convicted of a felony less than capital, to-wit, on the 19th day of January, 1954, in the United States District Court for the Northern District of Texas,

Dallas Division, in a case in said Court numbered 13,485 Criminal, and entitled United States of America vs. William Everett Reed, the said William Everett Reed was duly and legally convicted of a felony as aforesaid, a felony offense of having in his possession with intent to utter and publish as true, and uttering and publishing as true, a certain false writing, to-wit, a prescription, for narcotic drugs, a compound, sale, manufacture, derivative, and preparation of opium, to-wit, dilaudid, in violation of Section 494, Title 18, U.S.C.; and the said conviction occurred and the judgment thereon became final prior to the commission of the offense hereinabove alleged in and by the First Count of this indictment upon an indictment then legally pending in the said last named Court, of which said Court had jurisdiction and said conviction is final, and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. 13,485 Criminal, in the United States District Court for the Northern District of Texas, Dallas Division, under the name of William Everett Reed.

### Strike

FIFTH COUNT: AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present that prior to the commission of the offenses alleged in and by the First Four Counts of this indictment, he, the said William Everett Reed, was duly and legally convicted of a felony offense less than capital, to-wit, on the 18th day of July, 1949, in the United States District Court for the Northern District of (STRIKE) Texas, Dallas Division, in case in said Court numbered 12,234 Criminal and entitled United States of America vs. William Everett Reed, the said William Everett Reed was duly and legally convicted of a felony as aforesaid, the felony of unlawfully and knowingly transporting a certain stolen vehicle in interstate commerce and at the time the said Defendant so transported the said automobile he then and there well knew that same was stolen in violation of Section 2312, Title 18, U.S.C.; and said judgment and conviction thereon occurred and became



[fol. 38] final, prior to the commission of the offenses hereinbefore alleged in and by the First Four Counts of this indictment upon an indictment then legally pending in said last named Court, of which the said Court had jurisdiction; said conviction was and is final; and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. 12,234 Criminal, in the United States District Court for the Northern District of Texas, Dallas Division, under the name of William Everett Reed.

### Quash

**SIXTH COUNT: AND THE GRAND JURORS AFORESAID**, upon their oaths aforesaid, do further present that prior to the commission of the offenses alleged in and by the First Four Counts of this indictment, he, the said William Everett Reed, was duly and legally convicted of a felony offense less than capital, to-wit, on the 2nd day of December, 1949, in the United States District Court for the Eastern District of Kentucky, in a case in said Court numbered 7737, and entitled United States of America vs. William Everett Reed, the said William Everett Reed was duly and legally convicted of a felony as aforesaid, a felony of escaping from the United States Public Health Service Hospital, in violation of Section 261(b), Title 42, U.S.C.; and said judgment and conviction thereon occurred and became final, prior to the commission of the offenses hereinbefore alleged in and by the First Four Counts of this indictment upon an information then legally pending in said last named Court, of which the said Court had jurisdiction; [fol. 39] said conviction was and is final; and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. 7737, in the United States District Court for the Eastern District of Kentucky, under the name of William Everett Reed.

**FIFTH COUNT: AND THE GRAND JURORS AFORESAID**, upon their oaths aforesaid, do further present that prior to the commission of the offenses alleged in and by the First Four Counts of this indictment, he, the said William Everett Reed, was duly and

legally convicted of a felony less than capital, to-wit, on the 19th day of May, 1949, in the Criminal District Court No. 2 of Dallas County, Texas, in a case in said Court numbered 5387-BA and entitled the State of Texas vs. William Everett Reed, the said William Everett Reed, was duly and legally convicted of a felony as aforesaid, to-wit, unlawful possession of narcotics; and said judgment and conviction thereon occurred and became final prior to the commission of the offenses hereinbefore alleged in and by the first Four counts of this indictment upon an indictment then legally pending in the said last named Court, of which the said Court had jurisdiction; said conviction was and is the same person who was convicted in Cause Number 5387-BA in the Criminal District Court No. 2 of Dallas County, Texas, under the name of William Everett Reed.

**SIXTH COUNT: AND THE GRAND JURORS AFORESAID**, upon their oaths aforesaid, do further present that prior to the commission of the offenses alleged [fol. 40] in and by the first four counts of this indictment, he, the said William Everett Reed, was duly and legally convicted of a felony less than capital, to-wit, on the 19th day of May, 1949, in the Criminal District Court No. 2 of Dallas County, Texas, in a case in said Court numbered 5423-BA and entitled the State of Texas vs. Williams Everett Reed, the said William Everett Reed, was duly and legally convicted of a felony as aforesaid, to-wit, theft of corporeal personal property of the value of Fifty (\$50.00) Dollars or over; and said judgment and conviction thereon occurred and became final prior to the commission of the offenses hereinbefore alleged in and by the first four counts of this indictment upon an indictment then legally pending in the said last named Court, of which the said Court had jurisdiction; said conviction was and is final, and he, the said William Everett Reed, was and is the same person who was convicted in Cause Number 5423-BA in the Criminal District Court No. 2 of Dallas County, Texas, under the name of William Everett Reed.

**SEVENTH COUNT: AND THE GRAND JURORS AFORESAID**, upon their oaths aforesaid, do further present that prior to the commission of the offenses alleged

in and by the first four counts of this indictment, he, the said William Everett Reed, was duly and legally convicted of a felony less than capital, to-wit, on the 19th day of May, 1949, in the Criminal District Court of Dallas County, Texas, in a case in said Court numbered 5992-A and [fol. 41] entitled the State of Texas vs. William Everett Reed, the said William Everett Reed, was duly and legally convicted of a felony as aforesaid, to-wit, theft of corporeal personal property of the value of Fifty (\$50.00) Dollars or over; and said judgment and conviction thereon occurred and became final prior to the commission of the offenses hereinbefore alleged in and by the first four counts of this indictment upon an indictment then legally pending in the said last named Court, of which the said Court had jurisdiction; said conviction was and is final, and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. 5992-A in the Criminal District Court of Dallas County, Texas, under the name of William Everett Reed.

EIGHTH COUNT: AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present that prior to the commission of the offenses alleged in and by the first nine counts of this indictment, he, the said William Everett Reed, was duly and legally convicted of a felony less than capital, to-wit, on the 20th day of June, 1947, in the Criminal District Court No. 2 of Dallas County, Texas, in a case in said Court numbered 2781-BA and entitled The State of Texas vs. William Everett Reed, the said William Everett Reed, was duly and legally convicted of a felony as aforesaid, to-wit, the offense of theft over \$50.00, a felony less than capital; and said judgment and conviction thereon occurred and became final prior to the commission of the offenses hereinbefore alleged in and by the first nine [fol. 42] counts of this indictment upon an indictment then legally pending in the said last named Court, of which the said Court had jurisdiction; and conviction was and is final; and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. 2781-BA in the Criminal District Court No. 2 of Dallas County, Texas, under the name of William Everett Reed.

**NINTH COUNT: AND THE GRAND JURORS**  
**AFORESAID**, upon their oaths aforesaid, do further present that prior to the commission of the offenses alleged in and by the first ten counts of this indictment, he, the said William Everett Reed, was duly and legally convicted of a felony less than capital, to-wit, on the 5th day of June, 1947, in the 59th Judicial District Court of Collin County, Texas, in a case in said Court numbered A-7525, and entitled The State of Texas vs. William Everett Reed, the said William Everett Reed, was duly and legally convicted of a felony as aforesaid, to-wit, the offense of burglary and attempt to commit burglary, a felony less than capital; and said judgment and conviction thereon occurred and became final prior to the commission of the offenses hereinbefore alleged in and by the first ten counts of this indictment upon an indictment then legally pending in the said last named Court, of which the said Court had jurisdiction; said conviction was and is final; and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. A-7525 in the 59th Judicial District Court of Collin County, Texas, under [fol. 43] the name of William Everett Reed.

against the peace and dignity of the State. "

/s/ JOHN E. WILLIAMS  
 Foreman of the Grand Jury

ENDORSED No. 11,416-C

THE STATE OF TEXAS vs. WILLIAM EVERETT REED  
 INDICTMENT

Offense: Burglary and Habitual Criminal

Stanley C. Kirk, District Attorney

John E. Williams, Foreman of the Grand Jury

Filed: March 9th, 1961, 7:15 PM

Amount of Bail: \$10,000.00

FLORA COBB, Clerk, District Courts

Wichita County, Texas

## AFFIDAVIT EXHIBIT No. 5

IN THE 89TH DISTRICT COURT  
OF WICHITA COUNTY, TEXAS

No. 11,416-C

THE STATE OF TEXAS

vs.

WILLIAM EVERETT REED

Filed: March 14, 1961.

## CHARGE OF THE COURT

In this case the Defendant is charged by Indictment with the offense of Burglary alleged to have been committed on the 14th day of March, 1960, in Wichita County, Texas; also, in the same Indictment, he is charged with having twice been previously convicted of a felony less than capital.

To which charge the Defendant has pleaded "Not guilty".

1.

The offense of BURGLARY is constituted by entering a house by force, threats, or fraud with the intent to commit the crime of theft.

[fol. 44]

2.

The term ENTERING means every kind of an entry except one made by the free consent of the owner or occupant of the house or one authorized to give such consent.

The term BREAKING means that the entry must be made by actual force, but the slightest force is sufficient to constitute breaking. It may be by prying a lock and opening a door.

A HOUSE is any building or structure erected for public or private use, and of whatever material it might be constructed.



## 3.

THEFT is the fraudulent taking of corporeal personal property belonging to another from his possession or from the possession of someone holding the same for him without his consent and with the intent to deprive the owner of the value of said property and with the intent to *appropriate* it to the benefit of the person taking the same.

## 4.

By the term *FRAUDULANT* TAKING is meant that the person knew at the time of the taking that the property was not his own; that the property was taken without the consent of the owners; that the property taken with the intent to deprive the owner of the value thereof and to appropriate it to the use and benefit of the person taking it.

## 5.

Any person who has the care, custody and management [fol. 45] of said property is deemed in law to be in possession thereof, and any person who is in possession of the house or property is in law deemed to be the owner thereof.

## 6.

The punishment for the crime of burglary is by confinement in the State Penitentiary for any term of years not less than two nor more than twelve years.

## 7.

Now, therefore, if you find from the evidence beyond a reasonable doubt that William Everett Reed on or about the 14 day of March, 1960, in Wichita County, Texas, did then and there unlawfully, by force, threats and fraud break and enter a house there situated and controlled by one Ernest Guffey, hereinafter called owner, without the owner's consent, and then and there with the intent of the Defendant to *fraudulantly* take, steal, and carry away from and out of said house the corporeal

personal property then and therein said house belonging to said owner from the possession of said owner, without the consent of said owner of said corporeal property with the intent to deprive the owner of the value thereof and with the intent to appropriate the same to the use and benefit of him, the said William Everett Reed, you will find the Defendant guilty of Burglary and assess his punishment at confinement in the penitentiary for a term of years not less than two nor more than twelve. Unless you do so find, or if you have a reasonable doubt thereof, you will find the Defendant not guilty.

[fol. 46]

8.

In the Second and Tenth Count of the Indictment, it is charged that the Defendant has two time been duly and legally convicted of a felony less than capital. You are charged as a matter of law that in determining whether or not the Defendant is guilty of the offense of Burglary alleged to have been committed on or about the 14th day of March, 1960, as charged in the First Count of the Indictment, you must not consider for any purpose the allegations in the Indictment that he has twice been previously convicted of a felony less than capital, if you so find, or any evidence that might have been introduced before you tending to show that he was so convicted.

9.

If you have heretofore found the Defendant guilty of Burglary as charged in the First Count of the Indictment herein and you further find beyond a reasonable doubt that, before the commission of the offense charged in the First Count of this Indictment herein, William Everett Reed was twice previously convicted of a felony less than capital, to-wit, on the 15th day of March, 1954, in the Criminal District Court No. 2, of Dallas County, Texas, in a cause in the said Court numbered 5201-H entitled THE STATE OF TEXAS VS. WILLIAM EVERITT REED, and William Everett Reed was duly and legally convicted in the last named court of the felony of Burglary; and, on the 20th day of June, 1947 in

the Criminal District Court No. 2 of Dallas County, [fol. 47] Texas, in cause number 2781-BA entitled THE STATE OF TEXAS VS. WILLIAM EVERETT REED, the said William Everett Reed was duly and legally convicted in the last named Court of the felony of Theft Over \$50.00, which conviction occurred and a judgment thereon became final prior to the commission of the offense for which the said William Everett Reed was convicted in cause number 5201-H in the Criminal District Court No. 2 of Dallas County, Texas; and the said convictions in cause number 5201-H in the Criminal District Court No. 2 of Dallas County, Texas, and in cause number 2781-BA in the Criminal District Court No. 2 of Dallas County, Texas, occurred and the judgments thereon became final prior to the commission of the offense hereinabove alleged to have occurred on or about the 14th day of March, 1960, upon Indictments then legally pending in said Courts of which said courts had jurisdiction and convictions were final, and he, the said, William Everett Reed, was and is the same person who was convicted in cause number 5201-H in the Criminal District Court No. 2 of Dallas County, Texas, on March 15, 1954, under the name of William Everitt Reed and in cause number 2781-BA in the *Crimnal* District Court No. 2 of Dallas County, Texas, on the 20th day of June, 1947, under the name of William Everett Reed, then you must find the Defendant guilty of having been twice previously convicted.

## 10.

In all criminal cases the Defendant has the right to [fol. 48] take the stand and testify as a witness in his own behalf, but in the event that he does not do so, such failure to so testify is not to be considered as any circumstance or evidence against him and you are therefore instructed that you must not discuss, refer to, or comment upon the failure of the Defendant to testify as a witness in this case.

## 11.

You are instructed that the Grand Jury Indictment is not evidence of guilt. It is the means whereby the De-

fendant is brought to trial in a felony prosecution. It is not evidence nor can it be considered by you in passing upon the innocence or guilt of this Defendant.


## 12.

In all criminal cases the Defendant is presumed to be innocent and the burden of proof is upon the State to establish his guilt by legal and competent evidence to the satisfaction of the jury beyond a reasonable doubt; and if in this cause, you have a reasonable doubt as to the guilt of the Defendant, you will acquit him and say by your verdict "Not Guilty".

## 13.

You are the exclusive judges of the facts proven, the credibility of the witnesses, and the weight to be given to their testimony; but the law of the case you will receive from the Court's Charge and be governed thereby.

/s/ GRAHAM B. PURCELL JR.,  
Judge



[fol. 49]

## AFFIDAVIT EXHIBIT No. 6

IN THE 89TH DISTRICT COURT  
OF WICHITA COUNTY, TEXAS

No. 11,416-C

## BURGLARY AND HABITUAL CRIMINAL

THE STATE OF TEXAS

vs.

WILLIAM EVERETT REED

## JUDGMENT

ON THIS the 14th day of March, the above entitled and numbered cause was called for trial, and the State appeared by her District Attorney, and the Defendant, William Everett Reed, appeared in person, in open court, his counsel, Don Wilson, also being present and having been duly arraigned in open court, and having pleaded "not guilty" to the charge contained in the indictment herein, both parties announced ready for trial; thereupon, a jury of good lawful men, to-wit, Maurice Jones and eleven others, was duly selected, impaneled and sworn, who having heard the indictment read, and the Defendant's plea of "not guilty" thereto, heard all of the evidence submitted with the Defendant being present at all times; after both sides had closed, and the Court had prepared its charge, but before the charge was presented to the jury, the Defendant voluntarily absented himself from said trial; and after the court, the District Attorney and the Defendant's counsel made all reasonable efforts to locate the Defendant, the jury was charged by the Court, retired in charge of the proper officer to consider their verdict, and afterward was brought into open court by the proper officer, the Defendant's counsel being present, and [fol. 50] in due form of law returned into open court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court:



"We, the jury, find the Defendant guilty of burglary as charged in the first count of the indictment herein, and we further find he was twice heretofore been convicted of a felony less than capital as charged in the second and tenth counts of the indictment."

MAURICE JONES, Foreman of the Jury

IT IS THEREFORE, CONSIDERED AND ADJUDGED by the Court that the Defendant, William Everett Reed, is guilty of the offense of burglary and habitual criminal as found by the jury, and that he be punished as has been determined by the jury by confinement for a term of life, and that the State do have and recover of the said Defendant, William Everett Reed, all costs in the prosecution expended, for which let execution issue.

The Defendant's attorney did then and there in open court give notice of appeal to the Court of Criminal Appeals sitting at Austin, Texas.

/s/ GRAHAM B. PURCELL, JR.,  
Judge

ENDORSE:

No. 11,416-C

THE STATE OF TEXAS vs. WILLIAM EVERETT REED  
JUDGMENT

Issued: March 20, 1961

Recorded: Vol. 5, Pages 278-79, Criminal Minutes  
of the 89th District Court, Wichita County, Texas  
FLORA COBB, Clerk, District Courts  
Wichita County, Texas

[fol. 51]

## AFFIDAVIT EXHIBIT No. 7

CRIMINAL DISTRICT COURT NO. ....  
DALLAS COUNTY

JANUARY TERM, 1954

No. 4561-IH March 15, 1954

THE STATE OF TEXAS

vs.

WILLIAM EVERITT REED

THIS DAY this cause was called for trial and the State appeared by her Criminal District Attorney, and the defendant William Everitt Reed appeared in person, his counsel also being present and both parties announced ready for trial, and the defendant and District Attorney of Dallas County, Texas, having agreed and requested in writing, as required by law, that the defendant be tried before the Court without a jury, and the court having agreed, the defendant in open Court in person pleaded "Guilty" to the charge contained in the indictment; thereupon the said defendant was admonished by the Court of the consequences of said plea, and the said defendant persisted in pleading guilty; and it plainly appearing to the Court that the defendant is sane, and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty is by the Court received and here now entered of record upon the minutes of the Court as the plea herein of said defendant, thereupon the indictment being presented and the defendant having pleaded guilty thereto, and the Court having heard the indictment read and the [fol. 52] defendant's plea of guilty thereto, and having heard the evidence submitted is of the opinion from the evidence submitted that the defendant is guilty as charged.

IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT, That the said Defendant is

guilty of the offense of Theft of Corporeal Personal Property of the value of \$50.00 or Over as confessed by him in his said plea of guilty herein made, and that he be punished by confinement in the penitentiary for 10 years, and that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue; and that said defendant be remanded to the Sheriff of Dallas County, Texas, to await the further order of the Court herein.

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AFFIDAVIT EXHIBIT No. 8

No. 4561-IH March 15, 1954

THE STATE OF TEXAS

vs.

WILLIAM EVERITT REED

SENTENCE

THIS DAY this cause being again called, the State appeared by her Criminal District Attorney, and the Defendant, William Everitt Reed was brought into open Court in person, in charge of the Sheriff, for the purpose of having sentence of law pronounced in accordance with the judgment herein rendered and entered against him at a former time of this term; and thereupon the said Defendant, was asked by the Court whether he had anything [fol. 53] to say why sentence should not be pronounced against him, and he answered nothing in bar thereof, whereupon the Court proceeded, in the presence of the said Defendant, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT, that the said Defendant, who has been adjudged to be guilty of Theft of Corporeal Personal Property of the value of \$50.00 or Over, and whose punishment has been assessed by the Court at confinement in the penitentiary for 10 years,

be delivered by the Sheriff of Dallas County, Texas, immediately, to the Superintendent of the Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said penitentiaries, for not less than 2 nor more than 10 years, in accordance with the provisions of the law governing the Penitentiaries of said State, and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence. Back time allowed. Sentence to begin Oct. 6, 1953. Sentence to run concurrently with Federal time. Released to Federal Authorities 3-24-54.

THE STATE OF TEXAS :  
COUNTY OF DALLAS :

I, BILL SHAW, Clerk of Criminal District Court of Dallas County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the Judgment and Sentence of the Court rendered and entered in the case of THE STATE OF TEXAS vs. William Everitt Reed, No. 4561-IH, as the same appears of record in Book [fol. 54] 38, pages 574, Minutes of the Court.

WITNESS my official Seal and Signature at my office in the City of Dallas, Dallas County, Texas, this 11th day of January, A.D. 1961.

BILL SHAW  
Clerk Criminal District Courts,  
Dallas County, Texas

By /s/ LOIS FEAGIN, Deputy  
(LOIS FEAGIN)

#### JUDGE'S CERTIFICATE

THE STATE OF TEXAS, :  
COUNTY OF DALLAS :

I, HENRY KING, Judge of the Criminal District Court of the State of Texas, in Dallas County, do hereby certify,

that Bill Shaw, whose genuine signature appears signed to the Certificate below, is the duly elected, qualified and acting Clerk of said Court, and was at the time of so signing same, and that said Certificate is in due form of law.

IN TESTIMONY of all of which I hereunto sign my name and affix my official seal at office in the City of Dallas, Dallas County, Texas, on this the 27th day of February, A.D. 1961.

/s/ HENRY KING  
Judge of the ——— District Court,  
Dallas County, Texas

(Seal)

#### CLERK'S CERTIFICATE

THE STATE OF TEXAS :  
COUNTY OF DALLAS :

I, BILL SHAW, Clerk of the District Courts, within [fol. 55] and for the County of Dallas, and State of Texas, do hereby certify that Judge HENRY KING, Criminal District Court No. 2 whose genuine signature appears signed to the above and foregoing Certificate is the duly elected, qualified and acting Judge of said Court, and was at the time of so signing same, and that said Certificate is in due form of law.

IN TESTIMONY OF ALL OF WHICH I hereunto sign my name and affix my official seal at office, in the City of Dallas, Dallas County, Texas, on this the 27th day of Feb. A. D. 1961.

BILL SHAW  
Clerk of the District Courts of  
Dallas County, Texas

/s/ BILL SHAW

(Seal)



## AFFIDAVIT EXHIBIT No. 9

Page 109 Lines 14-25

(Whereupon the document referred to was marked as State's Exhibit No. 8.)

MR. KIRK: This is a certified and exemplified copy of the indictment, judgment and sentenced in cause No. 4561-IH styled the State of Texas vs. William Everitt Reed dated March 15, 1954 which instruments have been certified to by Judge Henry King, Judge of the District Court of Dallas County, Texas, and his signature is certified to by Bill Shaw, Clerk of the District Courts of Dallas County, Texas. Such indictments reading as [fol. 56] follows:

(Reads State's Exhibit 8 to jury)

Page 110 Lines 1-17

MR. KIRK: Now the State introduces the judgment and sentence in its entirety but in the interest of time and brevity let the record show that the Defendant William Everitt Reed was adjudged guilty of the offense of theft of corporeal personal property of the value of over fifty dollars on March 15, 1954, and the sentence, in the same entitled and numbered cause reads as follows:

(Reads sentence to the jury) The name Everitt in this sentence and the indictment are spelled E-v-e-r-i-t-t.

MR. KIRK: The State introduces such instrument as its exhibit No. 8.

MR. WILSON: We renew our objection on the lack of foundation and also move for a mistrial on the ground that a reference to federal time is unauthorized comment on another conviction.

THE COURT: Overrule the objection.

MR. WILSON: Note our exception.

## AFFIDAVIT EXHIBIT No. 10

CRIMINAL DISTRICT COURT NO. ———,  
DALLAS COUNTY

APRIL TERM, 1947

No. 2781-BA June 20, 1947

THE STATE OF TEXAS

vs.

WILLIAM EVERETT REED

THIS DAY this cause was called for trial and the [fol. 57] State appeared by her Criminal District Attorney, and the defendant William Everett Reed appeared in person, his counsel also being present and both parties announced ready for trial, and the defendant and District Attorney of Dallas County, Texas, having agreed and requested in writing, as required by law, that the defendant be tried before the Court without a jury, and the court having agreed, the defendant in open Court in person pleaded "Guilty" to the charge contained in the indictment; thereupon the said defendant was admonished by the Court of the consequences of said plea, and the said defendant persisted in pleading guilty; and it plainly appearing to the Court that the defendant is sane, and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty is by the Court received and here now entered of record upon the minutes of the Court as the plea herein of said defendant, thereupon the indictment being presented and the defendant having pleaded guilty thereto, and the Court having heard the indictment read and the defendant's plea of guilty thereto, and having heard the evidence submitted is of the opinion from the evidence submitted that the defendant is guilty as charged.

IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT, That the said Defendant is

guilty of the offense of Theft Over \$50.00 as confessed by him in his said plea of guilty herein made, and that he be punished by confinement in the penitentiary for 2 years, [fol. 58] and that the State of Texas do have and recover of the said defendant all costs of this prosecution expended, for which execution will issue; and that said defendant be remanded to the Sheriff of Dallas County, Texas, to await the further order of the Court herein.

## SENTENCE

No. 2781-BA June 20, 1947

THE STATE OF TEXAS

*vs.*

WILLIAM EVERETT REED

Theft Over \$50.00

THIS DAY this cause being again called, the State appeared by her Criminal District Attorney, and the Defendant, William Everett Reed was brought into open Court in person, in charge of the Sheriff, for the purpose of having sentence of the law pronounced in accordance with the judgment herein rendered and entered against him at a former time of this term; and thereupon the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof, whereupon the Court proceeded, in the presence of the said Defendant, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT, That the said Defendant, who has been adjudged to be guilty of Theft Over \$50.00 and whose punishment has been assessed by the Court at confinement in the penitentiary for 2 years, be delivered by the Sheriff of Dallas County, Texas, [fol. 59] immediately, to the Superintendent of the Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant

shall be confined in said penitentiaries, for 2 years, in accordance with the provisions of the law governing the Penitentiaries of said State, and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence. Sentence to begin June 5, 1947.

THE STATE OF TEXAS :  
COUNTY OF DALLAS :

I, BILL SHAW, Clerk of Criminal District Court of Dallas County, Texas, do hereby certify that the above and forgoing is a true and correct copy of the Judgment and Sentence of the Court rendered and entered in the case of THE STATE OF TEXAS vs. William Everett Reed, No. 2781-BA, as the same appears of record in Book 31, Pages 289, Minutes of the Court.

WITNESS my official Seal and Signature at my office in the City of Dallas, Dallas County, Texas, this 11th day of January A.D. 1961

BILL SHAW  
Clerk Criminal District Courts,  
Dallas County, Texas

By /s/ LOIS FEAGIN, Deputy  
(LOIS FEAGIN)

### JUDGE'S CERTIFICATE

THE STATE OF TEXAS :  
COUNTY OF DALLAS :

I, HENRY KING, JUDGE of the Criminal District [fol. 60] Court of the State of Texas, in Dallas County, do hereby certify, that Bill Shaw, whose genuine signature appears signed to the Certificate below, is the duly elected, qualified and acting Clerk of said Court, and

was at the time of so signing same, and that said Certificate is in due form of law.

IN TESTIMONY of all of which I hereunto sign my name and affix my official seal at office in the City of Dallas, Dallas County, Texas, on this the 27th day of February A.D. 1961

/s/ HENRY KING  
Judge of the District Court,  
Dallas County, Texas

(Seal)

### CLERK'S CERTIFICATE

THE STATE OF TEXAS :  
COUNTY OF DALLAS :

I, BILL SHAW, Clerk of the District Courts, within and for the County of Dallas, and State of Texas, do hereby certify that Judge Henry King, Criminal District Court No. 2 whose genuine signature appears to the above and foregoing Certificate is the duly elected, qualified and acting Judge of said Court, and was at the time of so signing same, and that said Certificate is in due form of law.

IN TESTIMONY OF ALL OF WHICH I hereunto sign my name and affix my official seal at office, in the City of Dallas, Dallas County, Texas, on this the 27th day of February A.D. 1961.

BILL SHAW  
Clerk of the District Courts of  
Dallas County, Texas

/s/ BILL SHAW

(Seal)



[fol. 61]

**AFFIDAVIT EXHIBIT No. 11 BEING PORTION OF TESTIMONY  
APPEARING IN STATEMENT OF FACTS IN CAUSE 33,987**

**MR. KIRK:** The State introduces as its Exhibit No. 16 certified and exemplified copies of the indictment, judgment and sentence in cause No. 2781-BA Criminal District Court No. 2 of Dallas County, Texas, styled The State of Texas vs. William Everett Reed. The indictment alleges that the Defendant therein William Everett Reed on or about the 28th day of March, 1947, stole one automobile truck of the value of over fifty dollars such corporeal personal property belonging to W. M. Neipp. The judgment and sentence are dated November 20, 1947 and show that the Defendant was convicted of the offense of Theft over fifty dollars and was sentenced to two years in the State Penitentiary.

**MR. WILSON:** We make our same objection on lack of foundation and lack of identification with this Defendant.

**THE COURT:** Overruled.

**MR. KIRK:** Mark that one please?

(Whereupon the document referred to was marked as State's Exhibit No. 16).

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**AFFIDAVIT EXHIBIT No. 12**

**CRIMINAL DISTRICT COURT NO. ———,  
DALLAS COUNTY**

**JANUARY TERM, 1954**

**No. 5201-H March 15, 1954**

**THE STATE OF TEXAS**

*vs.*

**WILLIAM EVERITT REED**

**THIS DAY** this cause was called for trial and the  
[fol. 62] State appeared by her Criminal District Attor-

ney, and the defendant William Everitt Reed appeared in person, his counsel also being present, and both parties announced ready for trial, and the defendant and District Attorney of Dallas County, Texas, having agreed and requested in writing, as required by law, that the defendant be tried before the Court without a jury, and the court having agreed, the defendant in open Court in person pleaed "Guilty" to the charge contained in the indictment; thereupon the said defendant was admonished by the Court of the consequences of said plea, and the said defendant persisted in pleading guilty; and it plainly appearing to the Court that the defendant is sane, and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty is by the Court received and here now entered of record upon the minutes of the Court as the plea herein of said defendant, thereupon the indictment being presented and the defendant having pleaded guilty thereto, and the Court having heard the indictment read and the defendant's plea of guilty thereto, and having heard the evidence submitted is of the opinion from the evidence submitted that the defendant is guilty as charged.

IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT, That the said Defendant is guilty of the offense of Burglary as confessed by him in his said plea of guilty herein made, and that he be punished by confinement in the penitentiary for 10 years, [fol. 63] and that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue; and that said defendant be remanded to the Sheriff of Dallas County, Texas, to await the further order of the Court herein.

THE STATE OF TEXAS :  
COUNTY OF WALKER :

I, J. C. Roberts, HEREBY CERTIFY THAT I AM  
THE Record Clerk of the Texas Department of Cor-

rections, a penal institution of the State of Texas, situated in the County and State aforesaid. That in my legal Custody as such officer are the original files and records of persons heretofore committed to said institution; that the (X) photograph (X) fingerprints and (X) commitments attached hereto are copies of the original records or William Everitt Reed #138706 a person heretofore committed to said penal institution and who served a term of imprisonment therein; that I have compared the attached copies with their respective originals now on file in my office and each thereof contains, and is a full, true, and correct transcript and copy from its said original.

IN WITNESS WHEREOF, I have hereunto set my hand seal this 28th day of February, 1961.

/s/ J. C. ROBERTS, Record Clerk

THE STATE OF TEXAS :  
COUNTY OF WALKER :

I, Amos A. Gates PRESIDING JUDGE OF THE COUNTY COURT, do hereby certify that J. C. Roberts, [fol. 64] whose name is subscribed to the above certificate, was at the date thereof, and is now Record Clerk of the Texas Department of Corrections, and is the legal keeper and the officer having the legal custody of the original records of the said Texas Department of Corrections; that the said certificate is in due form and that the signature subscribed thereto is his genuine signature.

IN WITNESS WHEREOF, I have hereunto subscribed my name in my official character as such Judge, in the County and State aforesaid, this the 28th day of February, 1961.

/s/ AMOS A. GATES, Judge  
of the County Court,  
Walker County, Texas

THE STATE OF TEXAS :  
COUNTY OF WALKER :

I, J. L. Ferguson, CLERK OF THE COUNTY COURT of the County of Walker, State of Texas, which Court is a court of records having a seal which is annexed hereto, do certify that Amos A. Gaes whose name is subscribed to the foregoing certificate of the due attestation, was at the aforesaid subscribing, the same judge of the county court aforesaid, and was duly commissioned, qualified and authorized by LAW to execute the said certificate, and I do further certify that the signature of the above named judge of the said certificate of due attestation is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and annexed the seal of the County Court at my [fol. 65] office in said county, this the 28th day of February, 1961.

(Seal)                      /s/ J. L. FERGUSON, Clerk  
County Court, Walker County,  
Texas

### SENTENCE

No. 5201-H March 15, 1954

THE STATE OF TEXAS

vs.

WILLIAM EVERITT REED

### Burglary

THIS DAY this cause being again called, the State appeared by her Criminal District Attorney, and the Defendant, William Everitt Reed was brought into open Court in person, in charge of the Sheriff, for the purpose of having sentence of the law pronounced in accordance with the judgment herein rendered and entered against him on a former day of this term; and thereupon the said Defendant, was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof,

whereupon the Court proceeded, in the presence of the said Defendant, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT, That the said Defendant, who has been adjudged to be guilty of Burglary and whose punishment has been assessed by the Court at confinement in the penitentiary for 10 years, be delivered by the Sheriff of Dallas County, Texas, immediately, to the Superintendent of the Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant shall be con-[fol. 66] fined in said Penitentiaries not less than 2 nor more than 10 years, in accordance with the provisions of the law governing the Penitentiaries of said State, and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence. Back time allowed. Sentence to begin Oct. 16, 1953. Sentence to run concurrently with Federal time.

Released to Federal Authorities 3-24-54.

THE STATE OF TEXAS :  
COUNTY OF DALLAS :

I, BILL SHAW, Clerk of Criminal District Court of Dallas County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the Judgment and Sentence of the Court rendered and entered in the case of THE STATE OF TEXAS vs. William Everitt Reed, No. 5201-H as the same appears of record in Book 38, pages 575, Minutes of the Court.

WITNESS my official Seal and Signature at my office in the City of Dallas, Dallas County, Texas, this 24th day of March A.D. 1954.

BILL SHAW  
Clerk Criminal District Courts,  
Dallas County, Texas

By /s/ HARRY WHITE, Deputy  
HARRY WHITE



CRIMINAL DISTRICT COURT NO. ———,  
DALLAS COUNTY

JANUARY TERM, 1954

No. 4561-IH March 15, 1954

THE STATE OF TEXAS

vs.

WILLIAM EVERITT REED

THIS DAY this cause was called for trial and the State [fol. 67] appeared by her Criminal District Attorney, and the Defendant William Everitt Reed appeared in person, his counsel also being present and both parties announced ready for trial, and the defendant and District Attorney of Dallas County, Texas, having agreed and requested in writing, as required by law, that the defendant be tried before the Court without a jury, and the court having agreed, the defendant in open Court in person pleaded "Guilty" to the charge contained in the indictment; thereupon the said defendant was admonished by the Court of the consequences of said plea, and the said defendant persisted in pleading guilty; and it plainly appearing to the Court that the defendant is sane, and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty is by the Court received and here now entered of record upon the minutes of the Court as the plea herein of said defendant, thereupon the indictment being presented and the defendant having pleaded guilty thereto, and the Court having heard the indictment read and the defendant's plea of guilty thereto, and having heard the evidence submitted is of the opinion from the evidence submitted that the defendant is guilty as charged.

IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT, That the said Defendant is guilty of the offense of Theft of Corporeal Personal Property of the value of \$50.00 or over as confessed by him in his said plea of guilty herein made, and that he be

[fol. 68] punished by confinement in the penitentiary for 10 years, and that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue; and that said defendant be remanded to the Sheriff of Dallas County, Texas, to await the further order of the Court herein.

## SENTENCE

No. 4561-IH March 15, 1954

THE STATE OF TEXAS

vs.

WILLIAM EVERITT REED

Theft of Corporeal Personal Property of the value of \$50.00 or over:

THIS DAY this cause being again called, the State appeared by her Criminal District Attorney, and the Defendant, William Everitt Reed was brought into open Court in person, in charge of the Sheriff, for the purpose of having sentence of the law pronounced in accordance with the judgment herein rendered and entered against him on a former day of this term; and thereupon the said Defendant, was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof, whereupon the Court proceeded, in the presence of the said Defendant, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT, That the said Defendant, who has been adjudged to be guilty of Theft [fol. 69] of Corporeal Personal Property of the value of \$50.00 or over, and whose punishment has been assessed by the Court at confinement in the penitentiary for 10 years, be delivered by the Sheriff of Dallas County, Texas, immediately, to the Superintendent of the Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said penitentiaries, for not less than 2 nor more

than 10 years, in accordance with the provisions of the law governing the Penitentiaries of said State, and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence. Back time allowed. Sentence to begin Oct. 6, 1953. Sentence to run concurrently with Federal time. Released to Federal Authorities 3-24-54.

THE STATE OF TEXAS :  
COUNTY OF DALLAS :

I, BILL SHAW, Clerk of Criminal District Court of Dallas County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the Judgment and Sentence of the Court rendered and entered in the case of THE STATE OF TEXAS vs. William Everitt Reed, No. 4561-IH as the same appears of record in Book 38, Pages 574, Minutes of the Court.

WITNESS my official Seal and Signature at my office in the City of Dallas, Dallas County, Texas, this 3rd day of May A.D. 1954.

BILL SHAW  
Clerk Criminal District Courts,  
Dallas County, Texas

By /s/ HARRY WHITE Deputy  
HARRY WHITE

[fol. 70]

AFFIDAVIT EXHIBIT NO. 13 BEING PORTION OF TESTIMONY  
APPEARING IN STATEMENT OF FACTS IN CAUSE 33,987

BY MR. KIRK:

Q Lieutenant, I wish you would look at these instruments and see if you have ever looked at and examined them before?

A Yes, sir.

Q Do you recall about when that was?

A March 8, 1961.

Q Do you—

MR. WILSON: Lieutenant, how did this come into your possession?

A It was sent to my office from the District Attorney's office.

Q And you received it from the District Attorney's office?

A Yes, sir.

MR. WILSON: I object on the lack of foundation on this instrument.

THE COURT: Overrule the objection.

MR. WILSON: Note our exception.

MR. KIRK: The State introduces as its exhibit No. 10, the *commitment* papers of William Everitt Reed in Cause No. 5201-H dated March 15, 1954 in the Criminal District Court No. 2 of Dallas County, Texas, and in cause No. 4561 styled the State of Texas vs. William Everitt Reed, dated March 15, 1954, Dallas County, [fol. 71] Texas, together with his picture and finger print record, and such instruments have been certified, exemplified and authenticated by J. C. Roberts the Records Clerk of the Texas Department of Corrections a penal institution of the State of Texas and his signature is is certified to and the fact that he is the records clerk is verified to by Amos A. Cates, County Judge of Walker County, Texas, and Judge Cates' authority and signature is certified and verified to by J.L. Ferguson the County Clerk of Walker County, Texas.

(Whereupon the documents referred to were marked as State's Exhibit No. 10.)

BY MR. KIRK:

Q Lieutenant, have you ever made a *fringer* print comparrison between the finger prints which have been introduced as State's Exhibit No. 7 and the finger prints which have been introduced as State's Exhibit No. 10?

A I have.

Q In your opinion are they of one and the same person?

A They are.

Page 118—Lines 3 to 25

and

Page 119—Lines 1 to 10

Q All right ~~str~~ have you made a comparrison of the finger prints in State's Exhibit No. 11 with the finger [fol. 72] prints in State's Exhibit No. 7—12 and 7, I am sorry?

A I have.

Q In your opinion are they one and the same person?

A They are.

MR. KIRK: Do you want this in or out?

MR. WILSON: I am objecting to the alteration.

MR. KIRK: Oh you want it in we will leave that in it then. (Hands instrument to the jury.)

MR. KIRK: The State introduces as its Exhibit No. 13 a certified, exemplified authenticated copy of the indictment, judgment and sentence in cause No. 5387-BA in the Criminal District Court of Dallas County, Texas, being cause No. — being entitled The State of Texas vs. William Everett Reed. The exhibit bears the Judge's certificate and the clerk's certificate, the indictment, and although introduced in its entirety for the sake of brevity I will summarize it, it alleges the offense of possession of marihuana on or about the 5th day of October of 1958, signed by Richard H. McLancy I guess that is, Foreman of the Grand Jury. And the judgment and sentence in the same cause are dated May 19, 1949 and the Defendant is found guilty of the offense of unlawful possession of narcotics and they assessed a punishment of five years in the State Penitentiary.

MR. WILSON: We object to it on the grounds of lack of foundation and the lack of identification with this defendant.



THE COURT: Overrule the objection.  
[fol. 73] MR. WILSON: Exception

(Whereupon the documents referred to were marked  
as State's Exhibit No. 13.)

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IN THE UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed: February 1st, 1964

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Dr. George J. Beto, Respondent in the above numbered and entitled cause, and respectfully moves that the Court dismiss the petition for the following reasons:

I.

The petition does not state a cause of action upon which any relief can be granted by this Court.

II.

The petition and the exhibits thereto conclusively establish that the petition is wholly without merit.

III.

Respondent submits that the allegations of subparagraphs (a) and (b) of paragraph V of the petition, which are to the effect that there was no evidence to support the jury finding that Petitioner was the same person who had been previously convicted, is completely rebutted by the exhibits made a part of the petition.

The exhibits show that the method used to prove Petitioner's identity as the person previously convicted is the same as has been approved by the Court of Criminal Appeals of Texas in many cases. See *Broussard v. State*, 363 S.W. 2d 143 (Tex. Crim. App. 1962) and cases cited therein. The prosecution introduced certified copies of the judgment, sentence, commitment, fingerprint card and photograph of the defendant in each of the previous convictions. The fingerprint records and photographs were certified by the Records Clerk of the Texas Department of Corrections and were admissible without

further proof, Under the provisions of Art. 3731a, Tex. Civ. Stats., *Spencer v. State*, 300 S.W. 2d 950 (Tex. Crim. App. 1957). The prosecution then proved that the fingerprints of the persons previously committed were of the Petitioner, thus presenting the jury with both photographs of the person previously convicted and an expert opinion that the fingerprints were the same. Respondent submits that such a use of documentary evidence is wholly proper under the Constitution of the United States.

#### IV.

The allegations of subparagraph (c) of paragraph V of the petition are also without merit and do not state a cause of action upon which this Court can grant any relief.

The exhibits which accompany the petition show that the proof of the enhancement counts of the indictment prior to proof of the primary offense could not have harmed Petitioner. A reading of the trial court's charge (which is an exhibit to the petition) shows that the jury [fol. 75] was carefully instructed as to proper place such proof played in the case and the jury was instructed that the indictment itself was not evidence.

In addition, the copies of the State proceedings which accompany the petition clearly show that Petitioner has never raised the point presented by subparagraph (c) in the State Courts. The failure of Petitioner to exhaust the remedies available to him in the Courts of the State of Texas precludes the consideration of the allegations by this Court. 28 U.S.C.A. 2254; *Fay v. Noia*, 372 U.S. 391, 9 L. Ed. 2d 837, 83 Sup. Ct. 822 (1963)

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Court dismiss the petition herein.

Respectfully,

WAGGONER CARR  
Attorney General of Texas

/s/ SAM R. WILSON  
Assistant Attorney General

## IN THE UNITED STATES DISTRICT COURT

PETITIONER'S BRIEF IN SUPPORT OF PETITION AND IN  
OPPOSITION TO RESPONDENT'S MOTION TO DISMISS—

Filed: February 20, 1964

## STATEMENT OF CASE

Petitioner was, on the 14th day of March, 1961, convicted in Cause No. 11,416-C in the District Court of Wichita County, of the primary offense of burglary, with two prior convictions of ordinary felonies. His punishment [fol. 76] was assessed at confinement in the Penitentiary in the State of Texas for life. From that conviction an appeal was perfected to the Court of Criminal Appeals, and became No. 33,987, on the docket of such Court. The conviction was duly affirmed by said Court and appears as *Reed vs. State*, 353 S.W. 2d 850. Relator was subsequently taken into custody and delivered to the Penitentiary of the State of Texas, began service of his sentence imposed, and remains there at the present time.

The Petitioner has now served on that sentence a total in excess of two years, as shown by the certificate of the Department of Corrections of the State of Texas, made as part of the record, and dated April 25, 1963.

It is Petitioner's contention that the only valid punishment authorized to be assessed against him under the record in the foregoing case, was the minimum punishment of two years confinement in the Penitentiary, for the crime of burglary, and that the assessment of a punishment for life in the Penitentiary is wholly null and void and utterly without support by the testimony.

Thereafter, as reflected by the Petition and the exhibits attached thereto, the Petitioner applied to the Court of Criminal Appeals for the State of Texas for a Writ of Habeas Corpus or Writ of Error Coram Nobis. As is further reflected by the Petition and supporting exhibits, such application was denied by the said Court of Criminal Appeals. Thereafter, Petitioner filed the subject [fol. 77] Petition for a Writ of Habeas Corpus in this Honorable Court.

The two prior convictions relied upon to enhance the punishment to life imprisonment as an habitual offender, were alleged as follows:

Count No. 2 charged that Petitioner had been on the 15th day of March, 1954, convicted in the Criminal District Court No. 2, of Dallas County, Texas, in Cause No. 4561-H, upon the docket of that Court, of felony theft. To sustain that allegation, the State relied upon the introduced into evidence a certified copy of a judgment and sentence rendered in the Criminal District Court No. —, Dallas County, No. 4561-H, upon the docket of that Court, which judgment follows the usual form applied in pleas of guilty in felony cases before the Court and without the intervention of a jury. The punishment assessed was ten years confinement in the Penitentiary in the State of Texas. *No where* in said judgment is found any reference to Criminal District Court No. 2 of Dallas County, Texas, as charged in the indictment. There is nothing in said judgment or the caption thereof which shows that the judgment was rendered in Criminal District Court No. 2 of Dallas County, Texas. To the contrary, all reference to the Court rendering the judgment is that of Criminal District Court No. — of Dallas County. There is, therefore, a fatal variance between the judgment alleged in the indictment and that relied upon to sustain that allegation.

[fol. 78] The sentence passed upon the judgment shows to have been printed on a single sheet of paper with the judgment and follows on that single sheet of paper the sentence. The sentence is in the usual form, provided by the Law of Texas. Other than to a reference that the sentence was being pronounced in open Court, there is no reference whatsoever to the fact that the sentence was being passed in and as being the sentence of the Criminal District Court No. 2 of Dallas County, Texas.

The certificate to the judgment and sentence made by Bill Shaw, Clerk of the Criminal District Courts of Dallas County, Texas, certified that the judgment and sentence "Is a true and correct copy of the judgment and sentence of the Court rendered and entered in the case of The State of Texas vs. William Everett Reed, No. 4561-H, as the same appears of record in Book 38, Page 574, Min-

utes of the Court". **WHAT COURT?** The Criminal District Court of Dallas County, Texas, of which Bill Shaw was the Clerk. Moreover, the certificate of Judge Henry King attached to the certified copy, certifies that Bill Shaw is the Clerk of the Criminal District Courts of Dallas County, Texas.

It is, therefore, the contention of the Petitioner that it is shown without contradiction, that the State of Texas, not only wholly failed to prove the allegation of former conviction as alleged in the indictment, but proved a former conviction in another and different Court.

The Court of Criminal Appeals and this Court judicially [fol. 79] know that there is a Criminal District Court of Dallas County, Texas, and a Criminal District No. 2 of Dallas County, Texas, because each Court is created by a statute of the State of Texas and is separate and distinct from each other. Article 52, C.C.P.

Such being the case, it is the contention of the Petitioner, there is no place here for an application of the rule on intent, that is that the State intended to allege in the indictment that the judgment and sentence were rendered in the Criminal District Court No. 2 of Dallas County, Texas, or that the Clerk in certifying to the judgment and sentence was in error, and intended to certify to the judgment and sentence as having been rendered in Criminal District Court No. 2, rather than in Criminal District Court of Dallas County, Texas.

As to the second prior conviction upon the State relied to enhance Petitioner's punishment as an habitual offender, the certified copy of the judgment and sentence offered in evidence to support such allegation, are in the exact situation as those heretofore set forth. Again, there is an utter absence of any proof that the judgment and sentence were rendered in the Criminal District Court No. 2 of Dallas County, Texas, as alleged in the indictment. All the instruments show that the judgment and sentence there certified, were rendered in the Criminal District Court of Dallas County, Texas.

It is therefore, the contention of the Petitioner that the State of Texas in the trial of this Petitioner in the [fol. 80] District Court of Wichita County, Texas, did not prove that Petitioner has been twice, prior thereto,



convicted on ordinary felonies as alleged in the indictment, and the judgment and sentence in that case insofar as it decrees Petitioner to be an habitual offender and assessing his punishment at confinement is absolutely and utterly void. Petitioner, having now served on that sentence an excess of two years, such being in excess of the minimum punishment authorized to be assessed for the crime of burglary as charged in the primary offense, Petitioner is, therefore, entitled to his discharge from further custody under that judgment and sentence.

As further reflected by the Petition and exhibits attached thereto and the admission of respondent in Paragraph 4 of his Motion to Dismiss, proof of the enhancement counts of the indictment presented in the District Court of Wichita County, Texas, as aforesaid, admitted in evidence in the trial of the subject cause in the said District Court of Wichita County, Texas, prior to the time guilt was determined as to the primary offense charged. It is the contention of the Petitioner that such procedure as authorized, required, and accomplished under the law of the State of Texas, constituted an unfair trial in violation of the Fourteenth Amendment to the Constitution of the United States. And further violates Petitioner's rights under the Fifth and Sixth Amendments to the Constitution of the United States in that such reading to the jury of those indictments relating [fol. 81] to the Petitioner's prior convictions destroyed the impartiality of the jury and thereby denied Petitioner due process of law.

#### PROPOSITION OF LAW NO. 1

THE FAILURE OF THE STATE OF TEXAS TO INTRODUCE ANY EVIDENCE TO SUSTAIN THE ALLEGATIONS OF THE INDICTMENT AS TO THE ENHANCEMENT COUNTS CONSTITUTED AN IMPRISONMENT OF PETITIONER WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Where the allegations of the indictment of prior convictions for the purpose of enhancing punishment stated

that the conviction had been had in a certain District Court, and the proof showed a conviction in another District Court there was a variance between the allegations and proof which was fatal to the conviction. Such variance constitutes fundamental error and is properly inquired into by the Court of Criminal Appeals without a Bill of Exceptions. *Corley v. State*, 254 S.W. 2d 394, and case cited therein. *Corely* involved an appeal from Dallas County and a discrepancy in the charge and the indictment and the proof involving the same Court as the case at Bar. The result of this situation is that actually there was *no evidence* to support a judgment and sentence of life in the Penitentiary. In *Ex parte Lyles*, 323 S.W. 2d 950, it was recognized that a collateral attack by habeas corpus may be made upon a judgment on the basis of no evidence. It seems obvious that the situation here presented is one of no evidence as that there was one of insufficient evidence. In *Ex Parte Burch*, [fol. 82] 267 S.W. 2d 560, it was held that a prosecution under Article 63 of the Penal Code of Texas does not create an offense of being an habitual criminal but is only an enhancement statute. In other words, it is a condition where an excess of punishment may be assessed upon proper evidence.

The rule as stated in *Corpus Juris Secundum*, Volume 39, Habeas Corpus, Section 26, Subsection E, is as follows:

"In case of an excessive sentence by waiver of authority, as much of the sentence as is excessive may be relieved against on a Habeas Corpus, after the valid part thereof has been served or satisfied. Such relief cannot be obtained from an oppressive or unduly severe sentence, which is still within statutory limits. (Citing cases)."

The foregoing rule is recognized in *Ex parte Pruitt*, 141 S.W. 2d 333; *Ex parte Daniels*, 252 S.W. 2d 586; *Ex parte Huff*, 316 S.W. 2d 896. In *Ex parte Puckett*, 310 S.W. 2d 117, it was held that where enhancement of sentence of relator because of prior conviction in Federal Court was invalid, and relator had served the maximum term for the second offense of felony theft, he was en-

titled to the discharge on his application for Writ of Habeas Corpus. The Court, in this case, was not only considering the sufficiency of the indictment which alleged a conviction for the National Motor Vehicle Theft Act in [fol. 83] Federal Court, but was also considering the question of no evidence to show a conviction for felony usable under Article 63 of the Penal Code. Judge Woodley stated:

"We need not rest our decision upon these authorities alone. If one who violates the National Motor Vehicle Theft Act would, if the act had been committed in Texas, be guilty of receiving stolen property under laws of this state also, he would not, unless the value of the automobile was \$50 or more, be guilty of a felony."

The Court went on to hold that the allegations of the indictment were insufficient to sustain a life sentence.

The Petitioner has brought himself squarely within the excessive punishment rule and having served the minimum term that could be legally assessed under the admissible evidence, that is, two years for the primary offense of burglary since the jury returned no verdict as assessing the term of years, he is entitled to his discharge. *Ex parte Erwin*, 170 S.W. 2d 226; *Ex parte Rolen*, 294 S.W. 2d 403; *Ex parte Goss*, 262 S.W. 2d 412; *Ex parte Castleberry*, 216 S.W. 2d 584; *Ex parte Lindsey*, 331 S.W. 2d 320.

The rule is well settled that where there is no evidence of guilt (no evidence to support the allegation of indictment as to the enhancement statute, Article 63, Penal Code of Texas) the judgment assessing a life sentence under the enhancement statute is excessive and said [fol. 84] excess may be inquired of by habeas corpus after the valid portion of the sentence has been served. *Corpus Juris Secundum*, Volume 39, Habeas Corpus, Section 226, Subsection E; *Ex parte Pruitt*, 141 S.W. 2d 333; *Ex parte Puckett*, 310 S.W. 2d 117.

The modern rule followed by the majority of the States with reference to excessive punishment under the enhancement or habitual criminal statute is discussed in the case

of *In re McVickers*, 29 Calif. 2d 264, 176 P. 2d 40. The case held that the adjudication that an offender is an habitual criminal within the meaning of the California statute not to be an element of adjudicated guilt nor a part of the judgment of the conviction, and hence reaches the result that no violence is done to the finality of the judgment or conviction for the primary offense by permitting a collateral attack on the determination as to a prior conviction. So, where proof in habeas corpus proceedings to secure the release of the Petitioner from custody showed the Petitioner was an habitual criminal who had been previously convicted of felonies enumerated in the habitual criminal statute twice, but not three times, one of the convictions constituting only a misdemeanor by California law, was held that the Petitioner was entitled to be accorded the benefits as well as the penalties of the law applicable to persons who had suffered two, rather than three, prior convictions. The Court said that the Writ of Habeas Corpus would lie to review an ancillary adjudication of habitual criminality which was unsupported by the evidence as a matter of law and that the use of the Writ for this purpose is not subject to the objection that thereby the Writ is made a Writ of Error to review the judgment of conviction, or that it constitutes an unjustified collateral attack on such judgment, since an adjudication of the habitual criminal status is not a judgment or conviction, but involves merely a determination of certain facts which operate to prolong the confinement of the prisoner and limit his rights to parole. This same rule has been followed by the Court of Criminal Appeals of Texas in *Ex parte Burch*, 267 S.W. 2d 560, which held that an adjudication of guilt in the enhancement statutes as used does not create an offense of being an habitual criminal. Therefore, the collateral attack by means of habeas corpus is not upon the judgment of guilt with reference to the primary offense but only as to the enhancement feature of the case which would render a judgment in the subject case excessive.

A conviction of a criminal offense by a State Court based upon no evidence constitutes a violation of due process of law. *Thompson v. City of Louisville*, 362 U.S.



199; *Garner v. Louisiana*, 368 U.S. 157; *Taylor v. Louisiana*, 370 U.S. 154. Therefore, the failure of the State of Texas in the case at Bar to introduce any evidence to prove the obligation of the indictment that Petitioner had been convicted in the particular court alleged constitutes an imprisonment of the Petitioner without due process of law as to the excessive punishment.

[fol. 86] PROPOSITION OF LAW NO. 2

THE CONVICTION OF PETITIONER AND SENTENCING AS AN HABITUAL CRIMINAL WAS IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHT OF CONFRONTATION IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

### STATEMENT

To sustain the allegation that Petitioner was the one and same person convicted on the 15th day of March, 1954, in the Criminal District Court No. 2 of Dallas County, Texas, in Cause No. 4561-IH as alleged in the second count of the indictment, the certification of J. C. Roberts, Record Clerk of the Texas Department of Corrections, to which he attached (1) a photograph, (2) fingerprints (3) commitments, of the originals of records in his office, of William Everett Reed, No. 138706, all of which are reflected by Petitioner's exhibits attached to the Petition herein. As further reflected by the records in this cause, the commitments referred to were the same as the judgment and sentence of the State of Texas and used in evidence as heretofore pointed out. The fingerprints, purported to be those of William Everett Reed, as was the photograph. With the fingerprints so certified, a fingerprint expert based upon a comparison therewith with known fingerprints furnished from the Department of Corrections testified that they were those of the Petitioner. It was upon this testimony, alone, that the State relied to identify the appellant as being the one and same person as was convicted in the Criminal District Court No. 2 of Dallas County, Texas, as alleged. All of this [fol. 87] identifying evidence was received over the ob-



jection of the Petitioner's trial counsel. The same procedure was employed in identifying by fingerprints, the Petitioner as the convict alleged to have been convicted in the Criminal District Court No. 2 of Dallas County, Texas, on the 20th day of June, 1947, in Cause No. 2781-BA on the docket of said Court as charged in the eighth count of the indictment.

### ARGUMENT

The evidence relied upon to identify the Petitioner, was in violation of the Petitioner's constitutional right on confrontation as guaranteed by Section 10 of Article 1, of the Constitution of Texas and the Sixth Amendment to the Constitution of the United States and, which violation by a State Court constitutes to petitioner, a violation of due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

By the unlawful and illegal testimony relied upon to support the identification of Petitioner as the prior convict, definitely raises the Federal question that Petitioner has been denied due process of law in obtaining this petition, insofar as the prior convictions are concerned.

The proof relied upon by the State of Texas is the same procedure approved in numerous Texas cases, chief among which is that of *Davis v. State*, 321 S.W. 2d 873, over a dissenting opinion expressing the view that the evidence violated the constitutional guarantee of confrontation. In none of those cases wherein the procedure was approved did the Court of Criminal Appeals pass upon the constitutionality thereof, as against the contention of a violation of the guarantee of confrontation.

Neither the Supreme Court of the United States nor any of the other Courts of Federal jurisdiction have approved such procedure, especially against the contention of a violation of the constitutional guarantees of confrontation.

Petitioner, therefore, presents the question here and insists that the evidence identifying him as the prior convict as alleged in the indictment violated the guarantee of both the State and Federal Constitutions as heretofore

pointed out, and especially the violation of the Sixth Amendment by a State Court which constitutes to this Appellant a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

### PROPOSITION OF LAW NO. 3

THE PETITIONER WAS DENIED THE RIGHT TO A FAIR AND IMPARTIAL TRIAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND SIMILAR RIGHTS GUARANTEED HIM UNDER THE CONSTITUTION OF THE STATE OF TEXAS, WHEN THE INDICTMENT ALLEGING PRIOR FELONY CONVICTIONS WAS READ TO THE JURY AND PROOF THEREON WAS HEARD BY THEM PRIOR TO A FINDING GUILT UPON THE PRIMARY OFFENSE.

### STATEMENT

It is undisputed that at the trial of this cause the State prosecutor read the enhancement counts of the indictment to the jury and introduced into evidence evidence [fol. 89] of such prior convictions prior to the finding of guilt by the jury as to the primary offense. The Respondents do not deny this, but rather, insist that: (1) It was not harmful to Petitioner because the trial court's charge shows the jury was carefully instructed as to the proper place such proof played and the jury was instructed that the indictment was not evidence. (2) Petitioner, in failing to raise the point in State Court failed to exhaust the remedies available to him in the Courts of the State of Texas.

As to (1) the precise matter was considered in *Lane v. Warden, Maryland Penitentiary*, 320 F. 2d 179 (4th Cir., 1963) wherein the procedure allowing a reading of prior offenses alleged in the indictment at the outset of the trial was held to violate the constitutional requirement of due process, the Court stating:

"At the outset of Lane's trial the three indictments, each averring in repetitious fashion the details of

two prior convictions for violations of the Maryland narcotics laws, were read to the jury. This information, presented by the State itself as a matter of historical fact, can hardly have failed to influence the jurors at least as much as equivalent information obtained from newspaper articles, radio and television broadcasts, or remarks of a deputy marshal.

[fol. 90] Here, there was far less ground for jurors to doubt the truth of the matter than in cases where information comes from an unofficial source which has no responsibility for the conduct or ultimate fairness of the trial. Moreover, the likelihood of prejudice was enhanced in this case by the fact that the prior convictions of which the jurors were informed involved narcotics violations quite similar to those for which Lane was being tried. No issues of intent or intermingling of offenses made the information on these convictions relevant to the determination of Lane's guilt on the current charges. However, it is patent that jurors would be likely to find a man guilty of a narcotics violation more readily if aware that he has had prior illegal association with narcotics. Here is a classic instance of information that is nearly certain 'to weight too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.' [fol. 91] *Michelson v. United States*, quoted *supra*. Such a prejudice would clearly violate the standards of impartiality required for a fair trial."

As indicated in *Lane*, many states, recognizing the problem of affording a fair trial, in the premises, have changed their procedure to avoid informing the jury of a defendant's prior offenses until after there has been a determination of guilt on the current charge.

Why should there be resistance to such a change? The answer is apparent—the procedure of Texas and other affords prosecutors a potent instrument in obtaining and assuming convictions on current offenses. Under the law of Texas, the defendant cannot prevent the pleading and proving of the prior offenses by the State. *Redding v.*

*State*, 265 S.W. 2d 811. The Texas procedure is identical to that condemned in *Lane*.

Turning now to the Respondent's second point—the alleged failure of Petitioner to exhaust the remedy available to him in the State Court, Respondent fails to appreciate that there was no “remedy” available to him in Texas Courts then or now. Both prior to the trial and after the filing of the petition in this cause, the Court of Criminal Appeals of Texas has ruled adversely to Petitioner's position on the identical question here raised. *Carso v. State of Texas*, No. 36,295, — S.W. 2d —, [fol. 92] (January 29, 1964), appendix A. Respondent misreads *Fay v. Noia*, 372 U.S. 391. The “remedy” offered by the State referred to in *Noia* must be an “effective” to bar the Federal Court of the “power and the duty to provide it”. Nothing could be more ineffective than to require an exhaustion of a remedy that does not in fact exist. See, Appendix A.

WHEREFORE, Petitioner prays that Respondent's Motion to Dismiss be denied and that Petitioner's prayer for Writ be granted after hearing hereon.

Respectfully submitted,

/s/ EMMETT COLVIN, JR.

CHARLES W. TESSMER

EMMETT COLVIN, JR.

Attorneys for Petitioner

Lawyers Building

706 Main Street, Suite 400

Dallas 2, Texas

RI 8-3433 RI 7-5893

[ Certificate of Service (omitted in printing) ]

[fol. 93] APPENDIX A TO PETITIONER'S BRIEF  
COPY

No. 36,295

Appeal from Harris County

CARLOS F. CARSO, APPELLANT

v.

THE STATE OF TEXAS, APPELLEE

OPINION  
ON APPELLANT'S MOTION FOR REHEARING

Appellant complains that in our opinion on original submission we did not pass upon the contention that his rights were violated when the indictment alleging the prior convictions was read to the jury and exhibited before them. In his motion, appellant insists that he was denied the right to a fair and impartial trial under the Fifth and Fourteenth Amendments to the Constitution of the United States and like rights guaranteed to him under the Constitution of this State, when the indictment alleging the prior felony convictions was read to the jury and proof thereon was heard by them.

Appellant apparently overlooks the provision of Art. 642, V.A.C.C.P., which reads:

"Order of proceeding in trial.

"A jury being impaneled in any criminal action, the cause shall proceed in the following order:

"1. The indictment or information shall be read to the jury by the attorney prosecuting."

In *Redding v. State*, 265 S.W. 2d 811, this Court held that an accused was not denied due process under the Fourteenth Amendment to the Constitution of the United States because the indictment against him alleging prior convictions to enhance the punishment under the habitual criminal statute, Art. 63, V.A.P.C., was read to the jury. In the opinion on motion for rehearing, we said:



"The prior offenses were required to be plead and proven, and we can perceive of no deprivation of constitutional rights by these statutes which have been in existence for many years."

This holding was again followed in *Finley v. State*, 278 S.W. 2d 864.

The motion for rehearing is overruled.

DICE, Judge

(Delivered January 29, 1964)

Opinion approved by the court.

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## IN THE UNITED STATES DISTRICT COURT

MEMORANDUM AND ORDER GRANTING RESPONDENT'S  
MOTION TO DISMISS AND DISMISSING PETITION OF  
WILLIAM EVERETT REED FOR WRIT OF HABEAS  
CORPUS—Filed: May 5, 1964

The case is before the court on respondent's motion to dismiss.

Petitioner, William Everett Reed, is a prisoner in state custody by virtue of a judgment and sentence pronounced upon him April 11, 1961, by the 89th Judicial District Court for Wichita County, Texas. His conviction of burglary [fol. 95] was enhanced by the application of the Texas recidivist statute, Article 63, Texas Penal Code, and he was sentenced to life imprisonment. He appealed his conviction to the Court of Criminal Appeals where it was affirmed, *Reed v. State*, 353 S.W. 2d 850 (Tex. Ct. Crim. App. 1962), and he subsequently filed a petition with that same court for a writ of habeas corpus. That petition was denied on June 29, 1963.

Reed now petitions this court for a writ of habeas corpus, alleging that he is being deprived of his liberty without due progress of law in three respects: (1) There was no evidence to support the assessment of the life

sentence; (2) The evidence used to identify petitioner as the person convicted in the two prior felonies was in violation of petitioner's constitutional right to confrontation; and (3) The allegations in the indictment pertaining to the two prior convictions, and the proof used to support the allegations, were presented to the jury prior to a determination of guilt on the primary offense. The petitioner requests that the case be determined without an oral hearing. Respondent moves to dismiss the petition on the grounds that it does not state a cause of action upon which relief may be granted and is wholly without merit. The petition presents only questions of law and can be determined on the motion to dismiss.

(1) The discrepancy between the indictment and the proof supporting the two prior convictions was not equivalent to an entire lack of evidence to support the life sentence.

[fol. 96] Petitioner points out that the indictment alleges two prior convictions of a felony, both in Criminal District Court No. 2 of Dallas County; but that the judgments and sentences introduced as evidence of those two convictions did not show the number of the district court in Dallas County. Such a discrepancy is only a technical insufficiency. The case numbers correspond with the indictment, as well as the name of the defendant, the offense, and the dates. This court is not concerned with the sufficiency of the evidence, but only with whether the defendant was deprived of his liberty without due process of law. See *Bosselli v. Sanford*, 155 F. 2d 427 (5th Cir. 1946); *Jordan v. Steiner*, 184 F. Supp 432 (D.C.Md. 1960). And there is not such a complete lack of evidence so that it can be said that the defendant was deprived of any of his constitutional guarantees.

(2) Nor is the second ground urged by petitioner a sufficient basis for habeas corpus relief. In order to identify petitioner as the person who was convicted of the two prior felonies, the prosecution introduced certified copies of the judgment, sentence, commitment, fingerprint card, and photograph of the defendant in each of the previous convictions. The fingerprint records and photographs were certified by the Records Clerk of the Texas Department of Corrections, and expert testimony

was used to establish that the fingerprints of the persons previously committed were of the petitioner. It is urged that the use of such evidence deprived petitioner of his [fol. 97] right to confrontation as is guaranteed by the Sixth Amendment to the United States Constitution. But the use of such documentary evidence is entirely proper. The most that can be said for this argument is that it is an attack on the sufficiency and validity of the evidence. And as was pointed out above, this is not proper grounds for habeas corpus relief.

(3) The final ground urged by petitioner is not properly before the court at this time. Neither on appeal nor in the petition for habeas corpus in the State court has the petitioner raised any question as to the time at which the prior convictions were proved to the jury. This failure to exhaust the remedies available in the State courts precludes consideration of this allegation by this court. 28 U.S.C.A. Sec. 2254; *Fay v. Noia*, 372 U.S. 391 (1963). The argument that there is no remedy available in the State courts because there is precedent against petitioner's substantive position is specious at best. The statute is clear. "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C.A. Sec. 2254. Petitioner has the right to raise his third point in a petition for the writ of habeas corpus filed with the Texas Court of Criminal Appeals. Until this has been done, this court will not treat the issue.

IT IS, THEREFORE, ORDERED that respondent's [fol. 98] motion to dismiss be and it is hereby granted, and the petition of William Everett Reed for writ of habeas corpus be and it is hereby dismissed.

The clerk will record this Memorandum and Order on the minutes of the court and will forward true copies hereof to the Attorney General of Texas and counsel for petitioner.

Done at Houston, Texas, on this, the 5th day of May, A.D. 1964.

/s/ JOE INGRAHAM

United States District Judge

## IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed: May 21, 1964

Notice is hereby given that William Everett Reed, Petitioner above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on May 5, 1964.

Dated: May 19, 1964

CHARLES W. TESSMER  
EMMETT COLVIN, JR.

By /s/ EMMETT COLVIN, JR.  
706 Main Street  
Dallas 2, Texas  
Attorneys for Petitioner

[fol. 99]

## IN THE UNITED STATES DISTRICT COURT

(Number and title omitted)

MOTION FOR CERTIFICATE OF PROBABLE CAUSE—  
Filed: May 21, 1964

## TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Petitioner and, without waiver of his grounds alleged as reflected by Points (1) and (2) of the Memorandum and Order of this Court entered May 5, 1964, in addition to the grounds alleged therein would urge that a Certificate of Probable Cause should issue to authorize appeal to the United States Court of Appeals for the Fifth Circuit with particular regard to Point (3) of the Court's Memorandum and Order on the ground that 28 U.S.C.A., Section 2254, as construed by *Fay v. Noia*, 372 U.S. 391 (1963), as is reflected by the record in this cause and in the Opinion cited in Petitioner's Brief no "effective" remedy is available in the State

Courts of Texas and under the decision of *Fay* the Petitioner should be entitled to present such proposition to the United States Court of Appeals for the Fifth Circuit on the proposition that he has exhausted his effective remedies available in the Courts of the State of Texas, within the meaning of the aforesaid section.

PREMISES CONSIDERED, Petitioner moves the Court to grant his request for Certificate of Probable Cause authorizing thereby an appeal to the United States Court of Appeals for the Fifth Circuit.

CHARLES W. TESSMER  
EMMETT COLVIN, JR.

By /s/ EMMETT COLVIN, JR.  
706 Main Street, Suite 400  
Dallas 2, Texas  
Attorneys for Petitioner

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[fol. 100]

IN THE UNITED STATES DISTRICT COURT

COURT'S NOTATION ON CALENDAR SHEET—June 17, 1964

"6-17-64: Petitioner's motion for certificate of probable cause (28 U.S.C. 2253) will be granted. The clerk will notify counsel to draft and submit appropriate order.

J.I."



## IN THE UNITED STATES DISTRICT COURT

COST BOND ON APPEAL (CASH)—Filed: June 24, 1964

I, the undersigned, acknowledge that I and my personal representatives are bound to pay the State of Texas the sum of Two Hundred Fifty and no/100 (\$250.00) Dollars.

The condition of this Bond is that, whereas the Plaintiff, WILLIAM EVERETT REED, having appealed to the United States Court of Appeals for the Fifth Circuit by filing a notice of appeal on May 21, 1964, from a final judgment filed and entered on May 5, 1964, if the Plaintiff-Appellant shall pay all costs adjudged against it if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment if modified, then this bond is to be void, but if the Plaintiff-Appellant shall fail to perform this condition, payment of the amount of this bond shall be due forthwith.

And to secure this bond the sum of \$250.00 has been deposited in the Registry of this Court by the undersigned.

Signed this 23rd day of June, 1964.

/s/ EMMETT COLVIN, JR.  
706 Main Street  
Dallas 2, Texas

[fol. 101] Received and deposited said sum of \$250.00 in the Registry of this Court on 22nd day of June, 1964.

V. BAILEY THOMAS, Clerk  
U. S. District Court  
Southern District of Texas

By /s/ W. PAUL HARRISS  
Deputy

# IN THE UNITED STATES DISTRICT COURT

CERTIFICATE OF PROBABLE CAUSE—Filed: June 30, 1964

I, JOE INGRAHAM, the Judge in the above entitled cause in which the Petition for Writ of Habeas Corpus was dismissed, do hereby certify that there exists probable cause for the appeal under 28 U.S.C.—§ 2253.

Witness my hand and seal as such Judge at Houston, Texas this the 30th day of June, A.D. 1964.

/s/ JOE INGRAHAM  
United States District Judge

APPROVED:

/s/ EMMETT COLVIN, JR.  
Attorney for Petitioner

/s/ SAM R. WILSON  
Assistant Attorney General of Texas  
Attorney for Respondents

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[fol. 102]

# IN THE UNITED STATES DISTRICT COURT

PRAECIPE FOR CONTENTS OF RECORD ON APPEAL—  
Filed: June 30, 1964

TO THE CLERK OF THE ABOVE COURT:

You are hereby requested to make a transcript of record to be filed in the United States Court of Appeals for the Fifth Circuit, pursuant to notice of appeal filed herein, and to include in such transcript of record the following:

1. Petitioner's Application for Writ of Habeas Corpus.
2. Affidavit of Hon. Glenn Haynes, Clerk, Court of

Criminal Appeals of Texas, together with all numbered Exhibits attached thereto and made a part thereof.

3. Respondent's Motion to Dismiss.

4. Petitioner's Brief in Support of Petition and in Opposition to Respondent's Motion to Dismiss.

5. Memorandum and Order of Court dated May 5, 1964, dismissing Petition for Writ.

6. Notice of Appeal.

7. Certificate of Probable Cause.

8. Record of filing fee on Appeal.

9. Record of cost bond on Appeal.

10. This praecipe and service thereon.

Dated June 25, 1964.

/s/ EMMETT COLVIN, JR.  
CHARLES W. TESSMER  
Attorneys for Appellant

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[fol. 103]

[Clerk's Certificate to foregoing transcript  
omitted in printing.]

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[fol. 104]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 21846

WILLIAM EVERETT REED

versus

DR. GEORGE J. BETO, Director,  
Texas Department of Corrections

MINUTE ENTRY OF SUBMISSION—March 4, 1965

On this day this cause was called, and taken under submission by the Court on record and briefs on file.

[fol. 105]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 21846

WILLIAM EVERETT REED, APPELLANT

versus

DR. GEORGE J. BETO, Director, Texas Department of  
Corrections, APPELLEE

*Appeal from the United States District Court for the  
Southern District of Texas.*

Before TUTTLE, Chief Judge, and BROWN and FRIENDLY,\*  
Circuit Judges.

OPINION—April 7, 1965

BROWN, Circuit Judge: Reed appeals from the District Court's dismissal of his petition for habeas corpus. Reed was convicted of burglary. Because the jury also found him to have been twice previously convicted of a felony, the Judge sentenced him to life imprisonment under the Texas Habitual Criminal Statute.<sup>1</sup> This conviction was [fol. 106] affirmed by the Texas Court of Criminal Appeals. *Reed v. Beto*, 1962, . . . . Tex.Crim. . . . , 353 S.W. 2d 850. A post-appeal habeas corpus petition to that Court was also found to be without merit.

In his petition to the District Court, Reed asserted three grounds for relief. The first, that there was no evidence to support the life sentence because of a technical variance in the indictment and the proof supporting the two prior felony convictions, is clearly without merit in a habeas corpus proceeding. There is like-

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\* Of the Second Circuit, sitting by designation.

<sup>1</sup> TEXAS PENAL CODE art. 63: "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction by imprisoned for life in the penitentiary."

wise no substance to the second complaint that the introduction of certified copies of the judgment, sentence, commitment, fingerprint card, and photograph of the defendant in each of the two previous convictions was a denial of his right of confrontation under the Sixth and Fourteenth Amendments. This evidence was offered only for the limited purpose of establishing the identity of Reed as being the one convicted in the two prior cases, and that each conviction was for a felony less than capital. This evidence, supported by appropriate certification and expert testimony in the case of the fingerprint cards, was certainly competent for the purpose for which it was admitted, and no denial of any right of confrontation was established.

The serious issue raised by Reed is that the reading to the jury<sup>2</sup> of the indictment alleging prior felony convictions and the presentation of proof thereon deprived him of a fair trial in contravention of the Fifth, Sixth, and Fourteenth Amendments as to the charge of burglary which in turn set in operation the enhanced sentence. Quite understandably, great reliance is placed on the recent Fourth Circuit holding to that effect in *Lane v. Warden*, 4 Cir., 1963, 320 F.2d 179.

Judge Ingraham of the Southern District of Texas dismissed the petition on the ground that Reed had not exhausted his state remedies since it is admitted that he had not yet presented this issue to the Court of Criminal Appeals either on the direct appeal or by way of habeas corpus. Thus it could not be said under 28 USCA § 2254 that there was no "procedure available" to raise the question presented. In the ordinary run of cases, dismissal clearly would be correct, but in this instance we do not think it necessary. The Court of Criminal Appeals has as early as 1954, and as late as March 10, 1965, passed on this very issue—consistently holding it to be no violation of due process to read the indictment to the jury and introduce evidence of prior

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<sup>2</sup> Under TEXAS CODE CRIM. PROC. art. 642, the prosecuting attorney is authorized at the beginning of the trial to read the indictment to the jury.



felony convictions before the jury has found the accused guilty of the offense charged. *Redding v. State*, 1954, . . . . Tex.Crim. . . . , 265 S.W.2d 611; *Carso v. State*, 1964, . . . . Tex.Crim. . . . , 375 S.W.2d 297; *Stephens v. State*, 1964, . . . . Tex.Crim. . . . , 377 S.W.2d 189; *Oler v. State*, 1964, . . . . Tex.Crim. . . . , 378 S.W.2d 857; *Crocker v. State*, 1964, . . . . Tex.Crim. . . . , 385 S.W.2d 392; *Buhl v. State*, 1965, . . . . Tex.Crim. . . . , . . . . S.W.2d . . . . [No 37932, March 10, 1965]. In *Oler* the Court expressly declined to follow the 4th Circuit *Lane* [fol. 108] case, and further indicated that it considered such a change in the law to be beyond its power.

"This Court has not been granted rule making powers, and we have concluded that the radical changes in long established common law and statutory procedures which would be required, were appellant's contention to be sustained must therefore come from the Legislature and not from this Court." 378 S.W. 2d at 858.

In addition to this firm pronouncement, there has been no intervening United States Supreme Court decision of such direct or compelling a nature as to suggest that the Texas Court of Criminal Appeals would recognize, as it often does, that a fresh view must be taken.<sup>3</sup>

Thus we conclude that although there may be a procedure available, in these special circumstances, there clearly is no state remedy which could by any stretch of the imagination be pursued effectually. See *Hays v. Boslow*, 4 Cir., 1964, 336 F.2d 31; cf. *Whippler v. Balkom*, 5 Cir., 1965, . . . . F.2d . . . . [No. 21726, March 3, 1965]. Neither the statute nor the spirit of needed comity behind it require such a formalistic waste of precious judicial energy, state or federal. Adaptation in efficient judicial administration suggests no less. See *Younger Bros., Inc. v. United States*, S.D.Texas (3 Judge), 1965, . . . . F.Supp. . . . [C.A. No. 64-H-80, February 16, 1965].

<sup>3</sup> See, e.g., *Jackson v. Denno*, 1964, 378 U.S. 368, 84 S.Ct. . . . , 12 L.Ed.2d 908, and the resulting decisions of the Court of Criminal Appeals, *Lopez v. State*, 1964, . . . . Tex.Crim. . . . , 384 S.W.2d 345; *Harris v. State*, 1964, . . . . Tex.Crim. . . . , 384 S.W.2d 349.

[fol. 109] Passing then to the merits of this argument, in view of its being a pure question of law, we see no need to remand it for a determination by the District Court. This issue has been squarely decided—adversely to the Petitioner's position—by this Court in *Breen v. Beto*, 5 Cir., 1965, . . . . F.2d . . . . [No. 21518, January 28, 1965]. So long as that decision stands, denial of the relief was proper, although on the merits rather than for failure to exhaust state remedies.

AFFIRMED.

[fol. 111]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1964

No. 21846

[Title Omitted]

*Appeal from the United States District Court for the  
Southern District of Texas.*

Before TUTTLE, Chief Judge, and BROWN and FRIENDLY,\*  
Circuit Judges.

JUDGMENT—April 7, 1965

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, William Everett Reed, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate: May 12, 1965.

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\* Of the Second Circuit, sitting by designation.

[fol. 112]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 21846

[File Endorsement Omitted]

[Title Omitted]

PETITION FOR REHEARING—Filed April 26, 1965

TO THE HONORABLE JUDGES OF SAID COURT:

The Appellant above named respectfully petition this Honorable Court for a rehearing of the appeal in the above entitled cause, and in support of this petition represents to the Court as follows:

We reserve our argued position as to each of the points of appeal, but in this Petition we address ourselves solely to that feature of the Decision wherein we believe the Court may be convinced its result is based upon the application of an incorrect legal principle.

Therefore this Petition is devoted to convincing this Court that it has erred in its determination of the first major question put to it upon appeal. On the fifth page of the printed opinion, the Court concludes as to the merits of this proposition that the issue has been squarely decided adversely to Appellant by this Court in *Breen vs. Beto*, 5th Circuit, 1965, . . . F. 2d . . . (No. 21518, January 28, 1965) and that so long as such decision stands, denial of relief is proper. Appellant's position, simply stated, in all due respect to this Court is that the Opinion in *Breen* is incorrect and that proposition in *Lane vs. Warden, Maryland Penitentiary*, 320 F.2d 179 (4th Circuit, 1963) represents the correct view of the law. No justification for the onerous procedure under the Texas Habitual Criminal statute has ever been advanced except that it has been on the statute books for many years and no other reason has been advanced in this cause. Per-[fol. 113] mitting a State to stack the victims of an un-

justified procedure like cordwood through the years seems a poor excuse to deny a litigant a fair trial on this day. The fact that many progressive States, as indicated in Lane, have recognized the inherent unfairness and have changed their procedure to avoid informing the jury of extraneous offenses is evidence enough of the basic unfairness to the accused.

The Court's attention is also directed to *Stephens vs. State*, 1964, . . . Tex.Crim. . . , 377 S.W.2d 189, which case is now before the United States Supreme Court, undocketed, for determination as to whether or not certiorari will be granted. It is the understanding of Appellant that a Brief has been presented in *Stephens* by Hon. William VanderCreek, of Dallas, Texas, in behalf of Stephens and that the Attorney General of the State of Texas has also submitted a Brief to the United States Supreme Court in such case in opposition. This Court may desire, and it is urged by Appellant, to withhold its action upon Appellant's Petition for Rehearing pending a determination in *Stephens* by the United States Supreme Court.

For the foregoing reasons, this Petition for Rehearing should be granted.

CHARLES W. TESSMER  
EMMETT COLVIN, JR.  
706 Main Street, Suite 400  
Dallas, Texas 75202  
RI 8-3433 RI 7-5893  
Attorneys for Appellant

[Certification (omitted in printing)]

[fol. 114] \* \* \*



[fol. 115]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 21846

[File Endorsement Omitted]

[Title Omitted]

*Appeal from the United States District Court for the  
Southern District of Texas.*

\* \* \* \*

Before TUTTLE, Chief Judge, and BROWN and FRIENDLY,\*  
Circuit Judges.

ORDER DENYING PETITION FOR REHEARING—May 11, 1965

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

[fol. 116]

[Clerk's Certificate to foregoing transcript  
omitted in printing.]

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\* Of the Second Circuit, sitting by designation.

[fol. 117]

SUPREME COURT OF THE UNITED STATES

No. 268 Misc., October Term, 1965

WILLIAM EVERETT REED, PETITIONER

v.

GEORGE J. BETO, Director, Texas  
Department of Corrections

On petition for writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN  
FORMA PAUPERIS AND GRANTING PETITION FOR WRIT  
OF CERTIORARI—January 31, 1966

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 969 and placed on the summary calendar and set for oral argument immediately following No. 273 Misc.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

**LIBRARY**

**U. S. SUPREME COURT**

**AUG 25 1966**

**JOHN F. DAVIS, CLERK**

**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1966**

**No. 68**

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**LEON SPENCER,**

*Appellant,*

*vs.*

**THE STATE OF TEXAS,**

*Appellee.*

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**APPEAL FROM THE COURT OF CRIMINAL APPEALS  
FOR THE STATE OF TEXAS**

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**BRIEF FOR THE APPELLANT**

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**MICHAEL D. MATHENY**

**JOE B. GOODWIN**

**635 San Jacinto Building  
Beaumont, Texas**

*Attorneys for Appellant*

# INDEX

## SUBJECT INDEX

	Page
Opinion Below .....	1
Jurisdiction .....	1
Questions Presented .....	3
Statutes Involved .....	4
Statement .....	5
Summary of Argument .....	5

### ARGUMENT:

The appellant has been deprived of a fair and impartial jury and a fair and impartial trial and has thereby been denied due process of law by allowing the state to explain to each juror on voir dire examination that the state was contending the defendant had been convicted of murder with malice once before and to allow the reading of the indictment alleging a prior conviction of murder with malice and to introduce proof of a prior conviction of murder with malice of a former wife on the main trial of the defendant charged with murder with malice of his wife before the determination of the guilt or innocence of the defendant on the charge of murder with malice, the primary offense. Such evidence weighs too heavily upon the minds of the jury and thereby prejudices the defendant's right to a fair and impartial trial upon the basis of the primary offense, and such evidence is only admissible for the purpose of enhancement of the punishment, and would not have been admissible for any other purpose and would not come into consideration until the jury had determined the guilt of the defendant .....

6, 7

Conclusion .....	33
------------------	----

	Page
CITATIONS	
CASES CITED:	
<i>Baker v. Hudspeth</i> , 129 F.2d 779 (10 Cir., 1942), cert. den. 317 U.S. 681 .....	10, 13
<i>Bettes v. Brady</i> , 316 U.S. 455 .....	21
<i>Bute v. Illinois</i> , 333 U.S. 640 .....	21
<i>Breen v. Beto</i> , 341 F.2d 96 (5 Cir., 1965) .....	31
<i>Chandler v. Fretog</i> , 348 U.S. 75 .....	17
<i>Cummings v. State</i> , 396 S. W. 2d 298 .....	28
<i>Dunn v. U. S.</i> , 307 F.2d 883 (5 Cir., 1962) .....	19
<i>Estes v. State of Texas</i> , 381 U.S. 532 .....	13
<i>Ellison v. State</i> , 227 S. W. 2d 545 .....	25
<i>Fay v. New York</i> , 332 U.S. 261 .....	12
<i>Graham v. West Virginia</i> , 224 U.S. 616 .....	17
<i>Haggard v. Henderson</i> , 252 F. Supp. 763 .....	28
<i>Harris v. State of Oklahoma</i> , 369 P.2d 187 .....	28
<i>Harrison v. State</i> , 394 S. W. 2d 713 .....	28
<i>Harrison's Trial</i> , 12 How. St. Tr. 833 (1692) ....	26
<i>Heinze v. People</i> , 253 P.2d 596 .....	28
<i>Helton v. U. S.</i> , 221 F.2d 338 (5 Cir., 1955) .....	17
<i>Hill v. Hudspeth</i> , 168 P.2d 922, 161 Kan. 376 ....	28
<i>Holmes v. U. S.</i> , 284 F.2d 716 .....	16
<i>Irvin v. Dowd</i> , 366 U.S. 717 .....	11
<i>Jackson v. Denno</i> , 378 U.S. 368 .....	18, 22
<i>Kennedy v. State</i> , 105 N. W. 2d 710, 171 Neb. 160	28
<i>Lane v. Warden, Maryland Penitentiary</i> , 320 F.2d 179 (4 Cir., 1963) .....	19, 23, 25, 26, 29
<i>Marshall v. U. S.</i> , 360 U.S. 310 .....	15, 25
<i>McCallister v. Commonwealth</i> , 161 S. E. 67, 157 Va. 844 .....	28
<i>McDonald v. State</i> , 385 S. W. 2d 253 .....	25
<i>Michelson v. U. S.</i> , 335 U.S. 469 .....	7, 23, 24
<i>Miller v. State</i> , 394 S. W. 2d 601 .....	28
<i>In re: Murchison</i> , 349 U.S. 133 .....	13
<i>Oler v. State</i> , 378 S. W. 2d 857 .....	30
<i>Oyler v. Boles</i> , 368 U.S. 448 .....	17



# INDEX

iii

	Page
<i>Payne v. State of Okla.</i> , 388 P.2d 331 .....	28
<i>Regina v. Shuttleworth</i> , 3 C & K 375 .....	29
<i>Rice v. Sioux City Memorial Park Cemetery, Inc.</i> , 349 U.S. 614 .....	3
<i>Robertson v. State</i> , 197 So. 73, 29 Ala. App. 399 ..	28
<i>Sigler v. State</i> , 157 S. W. 2d 903 .....	25
<i>State v. Ferrone</i> , 113 Atl. 452, 96 Conn. 160 ..7, 17, 26, 27	26
<i>State v. Johnson</i> , 383 P.2d 326 .....	26
<i>State v. Kent</i> , 382 S. W. 2d 606 .....	28
<i>State v. Kirkpatrick</i> , 43 P.2d 244, 181 Wash. 313	28
<i>State v. Stewart</i> , 171 P.2d 383 .....	28
<i>State v. Zeimer</i> , 347 P.2d 1111, 10 Utah 2d 45 ....	28
<i>Turner v. State of Louisiana</i> , 379 U.S. 466 .....	11
<i>U. S. v. Banmiller</i> , 310 F.2d 720 (3 Cir., 1962) ....	19
<i>U. S. v. Jacangelo</i> , 281 F.2d 574 (3 Cir., 1960) ....	15
<i>U. S. v. Kum Seng Seo</i> , 300 F.2d 623 (3 Cir., 1962) .....	16
<i>U. S. v. Price</i> , 258 F.2d 918 (3 Cir., 1958) .....	20
<i>U. S. v. Wood</i> , 299 U.S. 177 .....	10
<i>Weinstein v. State</i> , 125 Atl. 889, 146 Md. 80 ....	14, 17
<i>Williams v. State</i> , 5 S. W. 2d 514 .....	25

## STATUTES:

Article 64, Texas Penal Code (Appendix B) ....	1, 3, 4, 5
Article 642, Vernon's Annotated Code of Criminal Procedure (Appendix C) .....	1, 2, 3, 4, 9
Title 28, U. S. Code 1257, §2 and §3 .....	2, 3
Fifth, Sixth & Fourteenth Amendments to the Constitution of the United States of America	4, 7, 8, 10, 11, 12, 13, 19, 21
556.280 Revised Statutes of Missouri, 1959 ....	27-28
21 Oklahoma Statutes Ann. 51 .....	28
Act of 6 and 7 William IV, C. III, 1836 .....	29

## MISCELLANEOUS:

Comment, "Evidence—The Introduction of Evidence of Prior Convictions Before a Jury in Habitual Criminal Proceedings", 43 Texas Law Review 392 .....	22, 28, 32
Vol. 2 McCormick & Ray, Texas Law of Evidence (2d Ed.) §251 p. 361 .....	14
U. S. Supreme Court Digest—Courts Key No. 397½(d) .....	3
Vol. 1 Wharton's, Criminal Evidence, §232 (12th Ed. 1955) .....	14
Vol. 1 Wigmore, Evidence (3d Ed. 1940) §57 and §194 .....	14

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 68

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LEON SPENCER,

*Appellant,*

*vs.*

THE STATE OF TEXAS,

*Appellee.*

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APPEAL FROM THE COURT OF CRIMINAL APPEALS  
FOR THE STATE OF TEXAS

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**BRIEF FOR THE APPELLANT**

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**Opinion Below**

The opinion of the Court of Criminal Appeals of the State of Texas is reported in 389 Southwestern Reporter 2nd Series, 304. A copy of the opinion of the Texas Court of Criminal Appeals is attached hereto as Appendix A.

**Jurisdiction**

The appellant was indicted and charged with murder with malice in the killing of Luvenia Irvine, his common-law wife, and was further charged under the terms and provisions of Article 64 of the Texas Penal Code, and Article 642 of

the Texas Code of Criminal Procedure, as having been previously convicted of the offense of murder with malice, and was sentenced to death in the electric chair. The order and the opinion of the Texas Criminal Court of Appeals affirming said conviction was entered on March 16, 1965, and Appellant's motion for rehearing was overruled without written opinion by said Court on May 5, 1965. A notice of appeal was filed in Texas Court of Criminal Appeals on June 5, 1965. The Jurisdictional Statement and alternate application for Writ of Certiorari was filed in the Supreme Court on June 10, 1965; each step and each procedure having been done within 90 days of the rendering of the original opinion and judgment of the Texas Court of Criminal Appeals.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C. 1257, §2 and §3.

On August 26, 1965, this court requested that the State of Texas, appellee, file a response in this case evaluating the appellant's claims in light of Texas Senate Bill 107 signed into law June 18, 1965. On September 17, 1965, Appellee's Response to Appellant's Appeal and Alternate Application for a Writ of Certiorari was filed. On September 25, 1965, the appellant's reply to appellee's response was filed herein.

On October 25, 1965, the Supreme Court issued an indefinite stay of execution pending the final determination of this appeal. On January 31, 1966, this Court granted the motion for leave to proceed *in forma pauperis* and ordered that further consideration of the question of jurisdiction be postponed to the hearing of the case on the merits. In the event this Court feels that it does not have jurisdiction under the terms and provisions of Title 28 U.S.C.

1257 §2 and §3, to review the constitutionality of Article 642 Code of Criminal Procedure since this article has now been repealed by the Texas Legislature, then the defendant would respectfully show unto the court that this is a serious question, i.e., one literally of life and death for this defendant, and that the procedure in question is still the law in approximately 25 states and this problem will continually occur in the future, and that the article in question was not repealed at the time of trial and is not retroactive in its application to this defendant. This defendant is not the only one whose rights have been in the past and will be in the future unconstitutionally denied because of this article and this procedure; therefore, this instant case is distinguishable from *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 614 and this is not a case of isolated significance and this matter represents an issue of immediate public significance, not only to the defendant but to all other people that will be charged in the future under the habitual criminal statutes. Under the many decisions of this court contained in Supreme Court Digest, Courts Key Number 397½ (b) this court should consider this matter as an alternate application for Writ of Certiorari and grant this Writ of Certiorari and reverse this matter in the event the court feels this appeal is improvident. Title 28 U.S.C. 1257, §2 and §3.

### Questions Presented

Do Article 64 of the Texas Penal Code and Article 642 of Vernon's Annotated Code of Criminal Procedure (Appendices B & C), and the accompanying procedure which requires a reading of the indictment by the prosecuting attorney after the impanelment of the jury and the present-



ment of proof to the jury of a prior conviction of murder with malice of a former wife prior to the determination of the guilt or innocence of the defendant on the primary charge of murder with malice of his wife deny such defendant due process of law and a fair and impartial jury as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America?

Have the provisions of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America been violated where the defendant in the criminal proceedings in the state court is convicted in the state by statute and procedure which require compliance with the Constitutional due process of law, by allowing the state to inform prospective jurors of a prior conviction, and to read portions of the indictment to the jury alleging a prior offense and to establish by proof the prior conviction before the jury prior to the determination of the guilt or innocence of the defendant on the primary offense, and by further allowing the jury to decide as to the validity of the prior offense and the identification of the defendant at the same time as determining the guilt or innocence of the defendant on the primary charge?

### **Statutes Involved**

Article 64 of the Texas Penal Code and Article 642 of Vernon's Annotated Code of Criminal Procedure as set forth in Appendices B & C hereto.

### **Statement**

The defendant was indicted by the 1964 grand jury of the Criminal District Court of Jefferson County, Texas sitting in Beaumont, Texas, and was charged with murder with malice in the killing of Luvenia Irvine, his common-law wife, said offense being charged as having occurred on January 7, 1964. The defendant was further charged under the terms and provisions of Article 64 of the Texas Penal Code as having been previously convicted on the third day of April 1951 of an offense to which the penalty of death was affixed as an alternate punishment, to-wit: murder with malice of a former wife. Said allegations of the prior conviction were for the purpose of enhancing the punishment in the event the jury convicted the defendant of the offense of murder with malice. Trial began on the 26th day of July, 1964, with selection of the jury, and the jury returned its verdict on Saturday, the 1st day of August, 1964, after approximately one hour of deliberation, and returned a verdict of murder with malice and further found that the defendant was the same individual who had been previously convicted of murder with malice and assessed his punishment at death in the electric chair. The defendant appealed to the Texas Court of Criminal Appeals, which affirmed his conviction.

### **Summary of Argument**

The defendant, Leon Spencer, has been deprived of a fair and impartial jury and a fair and impartial trial and thereby has been denied due process of law by allowing the State of Texas to explain to each juror on the voir dire examination that the state was contending the defendant

had been convicted of murder with malice once before and to allow the reading of the indictment alleging a prior conviction and to introduce proof of a prior conviction of murder with malice of a former wife on the main trial before the determination of the guilt or innocence of the defendant on the charge of murder with malice, the primary offense. Such evidence weighs too heavily upon the minds of the jury and thereby prejudices the defendant's right to a fair and impartial trial upon the basis of primary offense, and such testimony and evidence is only admissible for the purpose of enhancement of the punishment which would not come into consideration until the jury had determined the guilt of the defendant.

Such evidence of a prior conviction was not to be considered as any evidence of guilt on the primary offense and had this evidence come through any other source such as a court bailiff, newspaper accounts or during the trial of any other case it would universally be held to be so prejudicial as to declare a new trial.

The issue of determination of guilt or innocence on the primary offense is completely independent and disassociated with the question of enhanced punishment because of a prior conviction.

An instruction to the jury not to consider the evidence of a prior conviction as any indication of guilt on the primary offense is completely worthless and does nothing but draw this to the jury's attention.

It is well established that the admission of evidence or allegations of prior crimes at a criminal trial either to establish guilt or to show that a defendant would be likely to have committed the crime with which he is charged is a

denial of due process under the Fourteenth Amendment. *Michelson v. United States*, 335 U.S. 469 (1948).

Ideally, jurors would begin their duties on a particular case with what the behavioral scientists like to call "tabula rasa" or clean slate, a mind devoid of any prior impression concerning the case.

One of the fundamentals of our concept of justice is a fair and impartial trial before an unbiased judge and an unprejudiced jury; the effect of such procedure in issue is to reverse the presumption of innocence.

A jury might be unduly influenced by a confession found involuntary and thus not properly in evidence. Similarly, the jury is influenced when it examines prior convictions to see if they are sufficient to support enhancement. Withholding of information concerning a prior conviction until after a verdict is reached on the primary offense is fair and equitable. There is absolutely no advantage in apprising the jury of the prior conviction initially; this merely serves to prejudice the jury's determination of the primary issue.

"In this way, the well-recognized rights of an accused person will be protected, and the principles of justice and our long-established laws which have been designed to secure an impartial trial in every criminal case will be recognized, respected and obeyed." *State v. Ferrone*, 96 Conn. 160, 1113 Atl. 452 at page 458.

### Argument

As shown by the original transcript herein and as shown by the opinion of the Court of Criminal Appeals of Texas which is attached hereto as Appendix A, the defendant ob-

jected to the reading of the indictment and after the reading of the indictment, the defendant moved for a mistrial and also objected to any and all testimony in regard to the first conviction on the grounds that said evidence denied the defendant due process of law and a fair and impartial jury as guaranteed by the Fifth, Sixth and Fourteenth Amendments. The defendant did not take the witness stand, and his character was not put in issue as shown by the opinion of the Court of Criminal Appeals which specifically holds that this procedure does not violate the Constitution in any respect. The defendant has followed all state procedures in raising the federal question involved herein and all federal points were presented to the trial court at the appropriate time under the applicable Texas procedure and said questions were considered by the Texas Court of Criminal Appeals in rendering its opinion and were rejected. The record on file herein affirmatively shows that all necessary prerequisites of raising the federal issues involved were properly done even prior to the actual beginning of the trial itself.

Under the Texas procedure in existence at the time of this trial, after announcement of ready by both the State and the defendant, the prosecutor proceeded to examine the jury panel individually on voir dire. It was during this period that the prosecutor first brought to the attention of each individual juror the allegations of the prior conviction. These allegations were alleged in a formal indictment returned by a grand jury and officially signed by a foreman of the grand jury. The prosecutor informed each individual juror that even though this prior conviction of murder which was alleged in the indictment and which was signed by the foreman of the grand jury was not to be



considered as any evidence or proof on the question of the defendant's guilt or innocence on the primary charge, and that they could not consider the indictment or proof adduced as to the prior convictions for any purpose in determining the guilt or innocence of the defendant on the primary charge. This is the same as instructing each individual juror that they will not think of a specific thing such as an apple, a house, or a car, and there could be no other statement that would bring this to the attention of the juror's mind more explicitly than such an instruction. By this time the prospective jurors can only be thinking of one thing: the man before them is a criminal and has murdered once before. At this point the State's case was almost complete. The prosecutors throughout the State of Texas will readily admit that the easiest convictions are made under the enhancement statutes. As authorized by old Article 642 of Texas Revised Code of Criminal Procedure, the prosecutor read the indictment to the impanelled jury, and then again read in clear and unequivocal terms the allegation concerning a prior conviction of murder. Then with unquestionably tainted minds, the jury began to hear proof that the defendant, Leon Spencer, actually committed the prior offense of murder with malice of his wife, and at that point the first proof put on by the State of Texas was a certified copy of the indictment of the prior conviction, and a photograph of the defendant with a number across his chest showing that he had been convicted of murder with malice of a wife before, along with proof of the length of the sentence he received before. Testimony from police officials present at the prior conviction, and a certified copy of the conviction record from the Huntsville State Penitentiary were also introduced. This was all done before one scintilla of evidence was introduced against the

defendant on the charge of the primary offense of murder with malice for which he was on trial for his life. R. pp. 26-46.

From an examination of the transcript of record, it is apparent that the only purpose of introducing the evidence of a prior conviction of murder was to prejudice the defendant in the minds of the jury to such an extent that he would receive death in the electric chair and disregard his defense of murder without malice. It is submitted to this Honorable Court that the procedure in the instant case involving the death penalty violates the due process clause of the Fourteenth Amendment and also violates the Fifth and Sixth Amendments and denies this defendant a fair and impartial trial before a fair and impartial jury. The defendant would respectfully show that it has long been construed by court decisions that impartiality and a fair and impartial trial contemplate a trial before a jury of twelve impartial and unbiased men and is not a technical concept. It is a state of mind. *United States v. Wood*, 299 U.S. 177 at page 145 (1936). In *Baker v. Hudspeth*, 129 F.2d 779, 781, 782 (10 Cir., 1942), cert. den. 317 U.S. 681, it was held:

"That deeply imbedded in the right to a fair and impartial trial is a requirement that the jury of twelve men chosen to sit in judgment shall have no fixed opinion concerning the guilt or innocence of the one on trial and that their ultimate verdict shall be based upon the facts as they are submitted to them by the court under its instructions and superintendence. Anything less is a farce, and a travesty upon justice."

It is the position of the defendant that it would be a physical impossibility for the average juror or any indi-

vidual, however intelligent, to separate the knowledge that this defendant had been previously convicted of murder with malice of a former wife and pigeonhole this knowledge into one section of his mind until the jury had convicted him of the primary offense of murder with malice of another wife and then magically bring this knowledge back solely for the purpose of assessing the punishment of the defendant. The defendant is certain that in informing the jury of this prior conviction of murder the State as a practical matter precluded a fair hearing for the defendant as to his guilt on the charge of murder for which he was currently being tried. Being deprived of a fair hearing, the defendant was denied due process. The term, due process of law, has been construed not as a rigid exclusionary rule of evidence, but as a constitutionally imposed standard of fairness, required of all state procedures.

The right to a fair trial is guaranteed in the Sixth Amendment to the Constitution of the United States and is also embodied as to state court proceedings in the due process requirement of the Fourteenth Amendment. *Turner v. State of Louisiana*, 379 U.S. 466. A fair trial in a fair tribunal is a basic requirement of due process. USA Constitutional Amendment 14.

Impartiality of jurors is not a technical concept and the Constitution lays down no particular test to determine this as this court has held in *Irvin v. Dowd*, 366 U.S. 717 at page 721:

"England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has

become as much American as it was once the most English. Although this court has said that the Fourteenth Amendment does not demand the use of jury trials in a state's criminal procedure, *Fay v. People of State of New York*, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043; *Palko v. State of Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288, every state has constitutionally provided trial by jury. See Columbia University Legislative Drafting Research Fund, Index Digest of State Constitutions, 578-579 (1959). In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682; *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed. 2d 654. This is true regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in *Burr's Trial* 416 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds v. United States*, 98 U.S. 145, 155, 25 L.Ed. 244."

In the very recent case of *Estes v. State of Texas*, 381 U.S. 532, Mr. Justice Clark has stated:

"We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs."

Under the due process clause, as well as the Sixth Amendment, a defendant is accorded and indeed guaranteed the right to a fair and impartial trial. A fair and impartial trial contemplates a trial before a jury of twelve impartial and unbiased men. Jurymen cannot be impartial if fixed in their minds is the fact that the accused has been previously convicted for the same crime. In the words of the 10th Circuit in *Baker v. Hudspeth*, 129 F.2d 779:

"There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury, no wrong more grievous than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled. The denial of a fair and impartial trial as guaranteed by the Sixth Amendment to the Constitution, is also a denial of due process, demanded by the Fifth and Fourteenth Amendments, and the failure to strictly observe these constitutional safeguards renders a trial and conviction illegal and void, and redress therefore is within the ambit of habeas corpus."

This court has gone one step further in the case of *In re Murchison*, 349 U.S. 133 at page 136 in holding:

"A fair trial and a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our sys-



tem of law has always endeavored to prevent even the probability of unfairness."

In the case of Leon Spencer, in the light of human nature, the probability of unfairness to Leon Spencer was overwhelming. Allegations of a prior crime told to individual jurors on voir dire from the lips of a public official and read to the jury as part of the indictment before consideration of any evidence relevant to the current charge, and evidence introduced in open court under the court's sanction of a prior murder with malice of a former wife, is clearly more prejudicial than such evidence being brought to the jury's attention by any other conceivable means. A majority of the courts in this nation including this Honorable Court, have held that such evidence brought to the jury's attention by other means is so prejudicial as to require a verdict of guilty to be set aside. It is a well established rule of law that a person charged with a crime has a fundamental right to be tried on the merits of each charge against him. He is entitled to be tried not as a criminal generally, but upon the charge against him.

It is a further well-established general rule that evidence or allegations of prior convictions are inadmissible at a criminal trial either to establish guilt or to show that the defendant would be likely to commit the crime with which he is charged. *Weinstein v. State*, 146 Md. 80, 125 Atl. 889 (1924); 1 Wharton's *Criminal Evidence* §232 (12th ed. 1955); Vol. 2, McCormick & Ray, *Texas Law of Evidence*, 2d Ed. §251 at page 361; 1 Wigmore, *Evidence* (3rd Ed. 1940) §57. The primary reason for not admitting such evidence is that knowledge of other crimes is likely to prejudice the jurors against the accused and predispose them to a belief in his guilt. See 1 Wharton, *supra*, §232.

The little relevance such evidence has is heavily outweighed by its almost certain prejudicial effect. The strong judicial feeling that the jury's knowledge of prior crimes is highly prejudicial is well illustrated by decisions of the Supreme Court of the United States. Among the most noteworthy of these is *Marshall v. United States*, 360 U.S. 310 (1959), in which the Supreme Court granted certiorari because of:

"doubts whether exposure of some of the jurors to newspaper articles about petitioner [which concerned previous convictions] was so prejudicial in the setting of the case as to warrant the exercise of . . . supervisory power to order a new trial." (360 U.S. at 310-11)

In holding that the exercise of such supervisory power was warranted, the court stated:

"We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence." (360 U.S. at 312-13)

After the *Marshall* case, the Third Circuit, in *United States v. Jacangelo*, 281 F.2d 574 (3 Cir. 1960), held that the reading to the jury of a co-defendant's confession containing references to defendant's previous convictions required that a mistrial be ordered. Setting defendant's conviction aside and remanding the cause for a new trial, the court stressed the ease with which the harmful remarks in the confession could have been deleted without destroying its continuity or destroying it in any significant way, saying:

"... we think he (the defendant) should not have been subjected to . . . risk of unwarranted harm through the pointless and *wholly unnecessary* disclosure of his prior complicity in crime. Therefore, scrupulous concern that criminal jury trials be safeguarded as far as possible against prejudicial influences dictates that the appellant be granted a new trial. (Emphasis added) (281 F.2d at 577)

The Fourth Circuit also has followed the *Marshall* rule in *Holmes v. United States*, 284 F.2d 716 (4 Cir. 1960). There, after a jury had been charged but before it began its deliberations, the deputy marshal in charge of the jury, in answer to a question by a juror as to where the defendants were staying, remarked that one of them was in the county jail serving a sentence. Granting a new trial, the court said:

"The subject matter of the communication was far from harmless. Nothing had occurred at the trial to make relevant evidence of a prior conviction of Bedami. The judge would not have permitted reference in open court to such a conviction. When the jury was privately informed of that fact by the deputy marshal out of the presence of the court and of counsel, there was not so much as opportunity to mitigate its obviously prejudicial effect." (284 F.2d 718-19)

An even more recent application of the *Marshall* rule appears in the *United States v. Kum Seng Seo*, 300 F.2d 623 (3 Cir. 1962) where, in a prosecution for violation of federal narcotics laws, the jury read newspaper clippings revealing defendant's incarceration in default of high bail (\$100,000.00). A new trial was ordered.

Even before the *Marshall* decision, federal and state courts had frequently set aside convictions because evidence of prior crimes had been brought before the jury. *Helton v. United States*, 221 F.2d 338 (5 Cir. 1955); *State v. Ferrone*, 96 Conn. 160, 113 Atl. 452 (1921). See also *Weinstein v. State*, *supra*. It is obvious that these courts disapproved of the admissibility of evidence of prior convictions because of its undoubtedly prejudicial nature.

This court in the matter of *Oyler v. Boles*, 368 U.S. 448 in proceedings not attacking the constitutionality of the procedure in question held that the determination of whether one is a habitual criminal is essentially independent of the determination of guilt on the underlying substantive offense.

This court held in the case of *Chandler v. Fretog*, 348 U.S. 75 (1954) that the hearing and trial on the felony charge, although they may be conditioned in a single proceeding are essentially independent of each other. This court further held many years ago in 1912 in the case of *Graham v. West Virginia*, 224 U.S. 616 (1912) that the portion as to the habitual criminal was merely for identification only and they are clearly not for the establishment of guilt. Mr. Justice Douglas, presenting opinion in the *Oyler* case on page 461 held:

"The charge of being an habitual offender is as effectively refuted by proof that there was no prior conviction or that the prior convictions were not penitentiary offenses as by proof that the accused is not the person charged with any new offense. The charge of being an habitual criminal is also effectively refuted by proof

that the prior convictions were not constitutionally valid."

It is unquestionably true that the issue of guilt and the issue of a prior conviction are separate fact determinations completely independent of each other. This case is analogous to the situation discussed and condemned by the court in the case of *Jackson v. Denno*, 378 U.S. 368 (1964) in that in those events where a jury might find and feel that a prior conviction was constitutionally invalid or was not an offense to which the penitentiary was assessed as punishment or that the defendant was not the same individual previously convicted, in that they would still have to determine his guilt or innocence on the primary charge. How could a normal juror separate the evidence of a prior conviction or allegation of a prior conviction from the evidence? This court in *Jackson v. Denno*, 378 U.S. 368 at page 389, footnote 15 notes that the Government should not have the windfall of having the jury influenced by evidence against the defendant which, as a matter of law they should not consider and which they cannot put out of their minds. The court further noted *that the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction*. This was a footnote relating to the use of a confession of a co-defendant, under limiting instructions and relating to the limited instructions concerning use of the declarations of co-conspirators.

It has therefore been long since recognized by this court that it is a physical impossibility for jurors to separate and pigeonhole in their minds certain matters that are to be considered only for certain purposes.



The Fifth Circuit in opinion by Judge Gewin in *Dunn v. U.S.*, 307 F.2d 883 concerning improper arguments states:

"One cannot unring a bell; after the thrust of the sabre it is difficult to say, 'forget the wound'; and finally, *if you throw a skunk into the jury box*, you can't instruct the jury not to smell it."

The Third and Fourth Circuit Courts of Appeals of the United States of America have each struck down these procedures and have said that such procedures have denied the appellants involved due process of law under the Fifth and Fourteenth Amendments. The Fourth Circuit Court of Appeals in the case of *Lane v. Warden, Maryland Penitentiary*, 320 F.2d 179 (1963) specifically holds that the state procedure involved in that matter, which is identical to the present case, denied the appellant due process under the Fifth and Fourteenth Amendments.

In another death penalty case, the Third Circuit Court of Appeals in the recent case of *U.S. v. Banmiller*, 310 F.2d 720 now specifically holds that the Pennsylvania procedure which is identical to the Texas procedure under attack (which existed prior to the adoption of the Split Verdict Act in the State of Pennsylvania and which permitted admission of prior unrelated convictions solely for the purpose of enabling the jury, after it had found the accused guilty of first degree murder in capital offenses, to determine in the same single verdict the validity of the prior conviction and the identification of the defendant, etc., to enhance the punishment), denied the defendant due process of law under the Fifth and Fourteenth Amendments.

Judge Biggs' opinion in *U.S. v. Banmiller*, 310 F.2d 720 (1962) at page 723 says:

"In respect to the habitual criminal statutes and their applicability, we point out that we are dealing with a death sentence. The danger resulting from prejudice is always enhanced in a capital case: passions run high, and the penalty is irreversible."

And at page 725 Judge Biggs further states:

"Certainly such a feat of psychological wizardry verges on the impossible, even for berobed judges. It is not reasonable to suppose that it could have been accomplished by twelve laymen brought together as a jury."

Judge Biggs' dissenting opinion in *U.S. v. Price*, 258 F.2d 918 at page 923 said:

"The impropriety of the Pennsylvania practice demonstrated by the circumstances of this case is so gross and results in such fundamental unfairness as to constitute a denial of due process of law."

Judge Hastie in his concurring opinion at page 923 said:

"Perhaps there are persons who can put this knowledge to one side until guilt is determined and then recall it to mind for the sole purpose of deciding what the sentence shall be. But certainly there is the gravest danger that this feat will be beyond the psychological capacity of the jurors, however intelligent or fair-minded they may be."

It is conceded by the prosecuting attorneys of the State of Texas that the easiest convictions which can be obtained are had by the State under the habitual criminal statutes, and that they realize that the jury considers prior convic-

tions, at least in their own minds, as evidence of guilt, particularly when the prior conviction involves similar fact situations, as in the instant case where the prior conviction was of murder with malice of a former wife, and the subsequent charge was of murder with malice of a former wife. The very first evidence introduced by the State in the instant case was a picture of the defendant in a prison uniform with a number across his chest, and then the state introduced certified copies of the judgment and conviction in the prior case and put proof before the jury that the defendant was out on parole and that this original sentence had not passed at the time of trial; all of these things were done solely for the purpose of prejudicing the defendant in the minds of the jury.

This Honorable Court in the case of *Betts v. Brady*, 316 U.S. 455 at page 462 held that:

"... that which may, in one setting, constitute a denial of fundamental fairness shocking to the universal sense of justice may, in other circumstances, in the light of other considerations fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed."

Further, Mr. Justice Burton stated in the case of *Bute v. Illinois*, 333 U.S. 640, 68 S.Ct. 763 at page 649 (1948) that:

"Due process under the Fourteenth Amendment . . . has reference . . . to a standard of process that may cover many varieties of processes that are expressive of different combinations of historical or modern, local or

other juridical standards, provided they do not conflict with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ”

*It is apparent that the conflict is obvious and glaring in the instant case before this court.*

Several states have realized the inherent unfairness to the defendant in such a procedure as in the instant case and revised their procedure by judicial decree. 43 Texas Law Review, *infra*, p. 394. Some 26 states follow the old practice of informing the jury at the outset of the trial. With a few exceptions, the remaining states follow the new procedure of informing the jury of the prior conviction only if and after the conviction for the present offense.

It is respectfully pointed out to the court that the procedure under attack at the present time is analogous to that of the case of *Jackson v. Depmo, infra* wherein this Honorable Court condemned as violative of due process a law allowing the jury to consider the voluntariness of the confession, as well as the defendant's guilt on the primary offense. The rationale was that the jury might be unduly influenced by a confession found involuntary and thus not properly in evidence. Similarly, the jury is influenced where it examined prior convictions to see if they are sufficient to support enhancement. This analysis is correct when the common-law procedure does not give the defendant due process, and, further, as shown by the Law Review article analysis, disregarding the due process question, it cannot be denied that the withholding of information concerning prior convictions until after a verdict is reached on the primary offense is fair and equitable and there is

absolutely no advantage in apprising the jury of the prior convictions at an earlier stage, particularly in the instant case, for had the jury convicted the appellant of only murder without malice, then such evidence of prior conviction would have been rendered inadmissible for any purpose; and indeed such presentment merely serves to prejudice the jury's determination on the primary issue of guilt or innocence, despite instructions to the contrary.

### Federal Decisions

In the case of *Lane v. Warden, Maryland Penitentiary*, 320 F.2d 179 (1963), Lane was a state prisoner who brought habeas corpus against the penitentiary warden on grounds that a fair trial was precluded by reading to the jury at the commencement of his prosecution for narcotics law violations, that part of the indictment setting forth the defendant's prior convictions on similar charges. Circuit Judge Boreman of the United States Court of Appeals, Fourth Circuit, wrote a lengthy opinion reaching the conclusion:

"That under the facts of this case, the reading to the jury at the commencement of Lane's trial of that portion of the indictment relating to his prior convictions destroyed the impartiality of the jury and denied him due process of law."

Judge Boreman methodically set about to show that prejudice arises where the jury, before determining his guilt or innocence on the charge for which he was on trial, is informed that the accused has been previously convicted of similar crimes. He relied upon *Michelson v. U.S.*, 335 U.S. 469 (1948) where the court said:



"Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . .

The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."

The court continued in *Michelson* by saying:

"The overriding policy of excluding such evidence despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." 335 U.S. 469 at pages 475-476.

Admittedly, in a footnote to the *Michelson* case (335 U.S. at 475, n. 8) this court indicated some qualification of the rule that the state may show defendant's prior trouble with the law, "as when a prior crime is an element of the later offense; for example, at a trial for being an habitual criminal." The possible qualification would not seem to be a problem in Texas, because the Court of Criminal Appeals has held on numerous occasions that the prior convictions alleged for enhancement are not an element of the primary offense but are to be used strictly in order to in-

crease the punishment. See Judge Woodley's concurring opinion on rehearing in *McDonald v. State*, 385 S. W. 2d 253 (1965) at page 254. Also see *Ellison v. State*, 227 S. W. 2d 545 (1950); *Sigler v. State*, 157 S. W. 2d 903 (1942); and *Williams v. State*, 5 S. W. 2d 514 (1928).

In the *Lane v. Warden, Maryland Penitentiary*, *infra*, case the court recognized the exception to the general rule that when the defendant voluntarily submits himself as a witness, he may, for purpose of impeachment, be interrogated concerning prior convictions and in the event he denies such convictions, proof could be presented. The court cited *Marshall v. United States*, 360 U.S. 310 (1959), where seven jurors obtained newspaper information as to a defendant's prior convictions. In the *Marshall* case, the court reversed notwithstanding that the trial judge made a personal finding by privately interviewing each juror and receiving their assurance that they would not be influenced or prejudiced by the newspaper articles.

Judge Boreman in *Lane v. Warden*, further stated:

"Although the Constitution does not demand the use of jury trials in a state's criminal procedure; where a jury trial is provided, it must be a fair trial." *Irvin v. Dowd*, 366 U.S. 717 (1961); *Fay v. New York*, 332 U.S. 261 (1947).

320 F.2d 186 in *Lane v. Warden*, it is stated:

"In such a case (referring to the *Lane* case) it is the duty of the Federal Courts to safeguard against the state's violation of the individual's constitutional right to a fair and impartial trial."

Shortly after the *Lane* decision, the Supreme Court of Idaho in *State v. Johnson*, 383 P.2d 326 (Idaho, 1963), reversed a forgery conviction where prior convictions relied on to enhance the punishment of a persistent violator had been read to the jury as a part of the information. The court adopted the procedure outlined in *State v. Ferrone, infra*, requiring that the entire information should be read to the accused and his plea taken in the absence of the jurors. Thereafter, the portion of the information which sets forth the crime for which he was to be tried should be read to the jury, but the jury should retire to consider the verdict only on the first part of the information. In the event a verdict of guilty, the second part of the information concerning the prior convictions was required to be read to the jury without reswearing them and they would then be charged to inquire on that issue under proper instructions. This excellent opinion contains an exhaustive survey on the procedures used in the various states.

The serious constitutional question of procedure in the prosecution of such cases was recognized as early as 1692 and this general exclusionary rule was first applied in *Harrison's Trial*, 12 How. St. Tr. 833, 864 (1692) where in the prosecution for murder, evidence of a prior felonious conduct was excluded with the court's observation:

"Hold, hold, what are you doing now? Are you going to arraign his whole life? How can he defend himself from charges of which he has not notice? And how many issues are to be raised to perplex me and the jury? Away, away! That ought not to be; that is nothing to the matter." 1 Wigmore, *Evidence* 3d Ed. §194.

### State Decisions

As early as 1921 the serious constitutional questions of procedure was recognized in the Connecticut Supreme Court of Errors in the case of *State v. Ferrone*, 96 Conn. 160, 113 Atl. 452, which revised the manner of procedure in the so-called habitual criminal statutes by stating:

"It cannot be believed that an accused man will ever have a fair trial resulting in a verdict not affected by prejudice or by considerations by which the jury should not be influenced, if during the trial, allegations that he has twice before been convicted of state prison crimes have been read to the jury, and the evidence of his former convictions has been placed before them, it is beyond question that knowledge of such facts must necessarily prejudice the minds of his triers against the accused and cause more serious injury than that which he would suffer from any improper remarks of the state counsel."

The case further held that in habitual offender cases two separate questions were presented. 1.) The issue as to the commission of the specific crime alleged and 2.) The issues as to the former convictions. The Connecticut practice requirements as set forth in *Ferrone* require that the verdict of the jury on the preliminary offense not be colored or tainted by knowledge of the alleged previous convictions. If such verdict on the principal issue be guilty, then the second issue may be submitted to the jury. After *Ferrone*, various other states began to change procedure either by legislation or by rules after recognizing the inherent unfairness to the defendant. See section 556.280

Revised Statutes Missouri, 1959; and *State v. Kent*, 382 S. W. 2d 606 (Missouri, 1964). Also see 21 Oklahoma Statutes Ann. 51 and *Payne v. State*, 388 P.2d 331 (Okla., 1963); *Harris v. State*, 369 P.2d 187 (Okla., 1962); *Heinze v. People*, 253 P.2d 596 (Colo., 1953); *State v. Stewart*, 171 P.2d 383 (Utah, 1946); *Robertson v. State*, 197 So. 73 (Ala., 1940); *McCallister v. Commonwealth*, 161 S. E. 67 (Va., 1931); *State v. Zeiner*, 10 Utah 2d 45, 347 P.2d 1111; *Hill v. Hudspeth*, 161 Kan. 376, 168 P.2d 922; *Kennedy v. State*, 171 Neb. 160, 105 N. W. 2d 710; *State v. Kirkpatrick*, 181 Wash. 313, 43 P.2d 244; Vol. 43 TLR p. 394, "Evidence—The Introduction of Evidence of Prior Convictions Before a Jury in Habitual Criminal Proceedings."

Since the trial of the instant case and the filing of this appeal the state of Texas has repealed the Code of Criminal Procedure provision in question and has provided for a split verdict. The Supreme Court of the state of Tennessee and the Supreme Court of the state of Arkansas have recently declared identical statutes unconstitutional based upon the contentions made in the instant case. These cases are *Miller v. State*, 394 S. W. 2d 601; *Harrison v. State*, 394 S. W. 2d 713 and *Cummings v. State*, 396 S. W. 2d 298. William E. Miller, Chief Judge of the United States District Court for Middle District of Tennessee in the matter of *William H. Haggard v. Henderson* contained in 252 F. Supp. 763 (1966) has specifically held that the introductions of former convictions to prove habitual criminal charges in conjunction with trial on the substantive offense constitutes not merely denial of procedural fairness, but denial of due process of law and that simultaneous trial of burglary and habitual criminal charges constitute a denial of due process of law and rendered the conviction void. Judge Miller, in his very well reasoned opinion, holds that the view



adopted by the 4th Circuit in *Lane v. Warden, Maryland Penitentiary, infra*, is also consistent with the decisions in the field of evidence. Subject to exceptions, it has been repeatedly held that the evidence of other offenses is not relevant to the charge on trial and may not be introduced.

Judge Miller further specifically pointed out that the split verdict procedure has been statutory procedure in England since the Act of 6 and 7 William IV, C. III enacted in 1836. Such act provided:

"It should not be lawful on the trial of any person for any such subsequent felony to charge the jury to inquire concerning such previous conviction until after they shall have inquired concerning such subsequent felonies and shall have found such person guilty of the same. Whenever in any indictment such previous conviction shall be stated, the reading of such a statement to the jury as part of the indictment shall be deferred until such a finding as aforesaid."

Exception was made in the cases where the accused gave evidence of good character to meet the charge of crime whereupon the prosecutor might show the former conviction before the verdict of guilty has been returned and in *Regina v. Shuttleworth*, 3 C & K 375, 376, Lord Campbell thus stated the practice under the statute by holding that:

"It is the opinion of all the judges that the prisoner is to be arraigned on the whole indictment and the jury ought to have the new charge only stated to them and if no evidence is given as to character, nothing is to be read to the jury of the previous conviction until the jury have given the verdict as to the new charge. The jury without being resworn are then to have the pre-

vious conviction told to them; and the certificate of it is to be put in and the prisoner's identity proved."

At the present time, approximately one-half of the states follow the old practice of informing at the outset of the trial. With a few exceptions, remaining states follow the new procedure of informing the jury of the prior conviction only if and after the conviction of the present offense. The cases and statutory provisions of various states are set forth in Appendix H of the Appellant's Jurisdictional Statement which is a copy prepared by the Legal Aid Clinic of Southern Methodist University Law School.

Although the trial court instructed the jury that it could not consider the evidence of the defendant's first conviction as any evidence of the guilt or innocence of the defendant on the primary charge of murder with malice or murder without malice, it is respectfully submitted unto the court that it is a psychological impossibility for the average juror, however intelligent or fair-minded he may be, to separate this evidence and to consider it only on the issue of punishment. In this case the defendant had been convicted before of the offense of murder with malice of his former wife and on the primary charge he was charged with murder with malice of his common-law wife and therefore, the prior conviction could not be separated by the jurors in their minds.

The Court of Criminal Appeals of the State of Texas has recognized that this procedure is wrong and in the case of *Oler v. State*, 378 S. W. 2d 837 (which upheld the constitutionality of this procedure) recognized the seriousness of this question and stated:

"While we agree that there is much merit in the appellant's contention, and undoubtedly the trend is in that direction we must exercise judicial restraint and await the action of the legislative branch of the government."

Recently the Court of Criminal Appeals of the State of Texas has attempted to ameliorate this situation and has allowed the defendant to stipulate the validity of the prior conviction where there is a mandatory punishment involved and where the jury does not have to assess the punishment. As shown by the record in this cause (R. 23), an attempt was made by the attorneys for the defendant to stipulate the existence of the prior conviction, but this was refused by the trial court and the Texas Court of Criminal Appeals on the ground that the jury could legitimately consider the existence of this prior conviction in assessing the punishment in the instant case at either life or death. It is the position of the attorneys for the defendant that the Fifth Circuit in *Breen v. Beto*, 341 F.2d 96 (5 Cir., 1965), while upholding the Texas procedure has stated that the Texas Court of Criminal Appeals has allowed for an alternate method of stipulation and that this helps to ameliorate the difficulties and the unconstitutionality and the bad procedure, but in the instant case of Leon Spencer, an attempt to stipulate was made and this attempt was refused by the trial court and the Texas Court of Criminal Appeals. The Legislature of the State of Texas in its proposed new Code of Criminal Procedure in 1963 amended this procedure and allowed a split verdict in such a case. This was passed by both houses of the Legislature of the State of Texas but was vetoed by the Governor of the State of Texas because of typographical errors in the bill actually reaching his

desk. There was a great hue and cry among the lawyers of the State of Texas to change this procedure as shown by a recent law review article, "Evidence—The Introduction of Evidence of Prior Conviction Before a Jury in Habitual Criminal Proceedings" Vol. 43 Texas Law Review p. 392. This article states that in the interest of justice, remedial legislation in Texas is not only desirable but necessary.

Since the filing of this appeal, the State of Texas has repealed the article in question effective January 1, 1966 and now has joined the line of all modern jurisprudence in the United States in allowing for a split verdict. This came into effect on January 1, 1966, and was not retroactive and was not applicable to the instant case. In effect the State of Texas has agreed to the amendment upon urging the lawyers of the State of Texas and the Texas Court of Criminal Appeals that the procedure in question is wrong, but if this conviction is allowed to stand, the defendant, Leon Spencer, will be denied a fair and impartial hearing before a fair and impartial jury and due process of law without the benefit of this remedial legislation.

Under the existing Texas procedure the only possible admissibility of the evidence of a prior conviction of murder on the part of the defendant was for the jury to enhance the punishment of the defendant. The defendant did not take the witness stand and his character was not put into evidence and the prior conviction should not have been submitted to the jury for any purpose until they had first convicted the defendant of murder with malice. In the instant case, the trial court submitted the defense of murder without malice based upon the facts that were presented

to the jury at that time (feeling that such defense was raised by the evidence); yet if the jury had found this defendant guilty of only murder without malice, his maximum punishment would have been five years and the terms and provisions of the enhancement statute would not have been applicable and the evidence of the prior conviction of murder with malice would have been inadmissible for all purposes since the first conviction was a conviction involving a capital offense and the second would have been a conviction involving a non-capital offense. The Court of Criminal Appeals of the State of Texas has met this problem by refusing to write on it and by stating that discussion of this contention would not add to the jurisprudence of this state.

### **Conclusion**

Wherefore, defendant respectfully prays that this Honorable Court note jurisdiction herein and reverse the judgment of the trial court and declare the procedure and statutes in question to be unconstitutional and reverse the affirmance of the Court of Criminal Appeals of the State of Texas and that the conviction be set aside, vacated and held for naught, and in the event this court feels that this appeal is improvident, the same be considered as an application and petition for writ of certiorari and that same be granted and that the judgment and sentence together with the order of affirmance in this matter be set aside and that a new trial be granted for this appellant and that this



Honorable Court issue said writ of certiorari in the Court of Criminal Appeals of the State of Texas as hereby prayed for by petitioner and appellant.

Respectfully submitted,

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This is to certify that I, Joe B. Goodwin, a member of the Bar of the Supreme Court of the United States, pursuant to Supreme Court Rule 33.3(b) have duly airmailed, postage prepaid, a true copy of the foregoing Appellant's Brief to the Hon. Waggoner Carr, Attorney General, State of Texas, Austin, Texas.

JOE B. GOODWIN

Dated:

**APPENDIX A**

APPEAL FROM JEFFERSON COUNTY

No. 37,921

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LEON SPENCER,*Appellant,*

VS.

THE STATE OF TEXAS,

*Appellee.*

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**OPINION**

The offense is murder; the punishment, enhanced under Art. 64, V.A.P.C., death.

Art. 64, V.A.P.C. provides that a person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary.

The testimony reflects that appellant and deceased had lived together for about four or five years and had separated in October or November, 1963. On January 7, 1964, around 7:30 P.M. deceased was at her home in the City of Beaumont with her two sons, aged fourteen and eight, and her daughter, about eighteen years of age, and her daughter's twenty month old baby. As deceased was lying on the bed playing with the baby the appellant walked into the house, entered the room where deceased was and almost immediately fired one shot with a pistol. The shot hit deceased in the face, and she fell off the bed. Deceased's daughter, who was in the room at the time this occurred, jumped over the bed and lay down on top of deceased to

protect her. At that time appellant walked around the bed, pulled deceased's daughter up and fired four more shots into deceased's face and head. Appellant was attacked at that time by deceased's fourteen year old son who had seen part of this occurrence. Appellant knocked the knife out of the son's hand and walked out of the front door of the house where he stopped and appeared to be either loading or unloading the pistol. The deceased's daughter ran out of the house after him and when she fell down, appellant looked back at her and told her her mother was no good and then he grinned.

After leaving the house where the shooting occurred, appellant walked into the Sheriff's Office at approximately 8:15 P.M. and had in his possession a .22 caliber pistol containing three live shells and three spent cartridge cases. The pistol was proved to have been purchased by the appellant from Phillips Pawn Shop in the City of Beaumont between 4:00 P.M. and 5:30 P.M. on January 7, 1964.

The cause of the deceased's death was established by medical testimony showing that she had died as a result of gunshot wounds to the brain.

The State proved that the defendant had been previously convicted of the offense of murder with malice as alleged in the indictment.

We find the evidence sufficient to sustain the verdict.

Appellant offered to stipulate, prior to the trial, that he had been previously convicted of murder as alleged in the second count of the indictment. Upon making this offer appellant moved the trial court to instruct the state not to read the portion of the indictment which referred to the prior conviction and not to offer any proof of said prior conviction, which motion was denied.

Appellant also objected to the reading of the indictment, and after the reading of the indictment alleging the prior conviction, he moved for a mistrial and also objected to any and all testimony in regard to the first conviction.

Appellant bottoms the foregoing contentions upon the theory that the trial court denied him due process of law

by sanctioning this procedure on the part of the state before the determination of his guilt on the primary offense. He contends that there was no fact issue for the determination of the jury as to his identity or the validity of the prior conviction.

Appellant also contends that Art. 64, V.A.P.C. is unconstitutional for the reason that it places the accused in double jeopardy in that this statutory provision uses the fact of the preceding offense to establish an element of the primary offense.

We shall dispose of these three related contentions together, as the parties have done in their briefs. We have consistently held that the procedure of reading an indictment to a jury showing that the person on trial has been previously convicted is not a violation of due process of law. We held in *Wright v. State*, 364 S. W. 2d 384, a case in which the appellant there offered to judicially confess and stipulate as to his former conviction instead of the State offering proof of the prior conviction, that the state could not be prevented from making proof of the prior alleged conviction. Wright's conviction was under Art. 64, V.A.P.C.

In *Pitcock v. State*, 367 S. W. 2d 864, this court, speaking through this scrivener, did announce a new rule *in those cases where "the jury has no choice in imposing punishment if it finds the appellant guilty and that he has been previously convicted."* We said: "Thus, if accused stipulates the prior conviction, that issue is resolved and the question of guilt is all that remains." We are convinced of the soundness of this rule, but *it is not applicable to cases coming under Art. 64, supra.* The jury does have a choice in imposing punishment under Art. 64, as may be seen from the foregoing terms of this article.

Since appellant's contentions have been before this Court numerous times, we shall not enter into a detailed discussion. His contentions have been adversely decided by this Court in the rather recent case of *Wigginton v. State*, No. 37,645, and cases there cited.

We adhere to these prior holdings and overrule appellant's contentions.

We have examined with great care appellant's remaining contentions, but we find no error reflected by them. It would contribute nothing to the jurisprudence of this state by discussing them here.

Finding no reversible error, the judgment is affirmed.

McDonald, Presiding Judge

(Delivered March 17, 1965)



**APPENDIX B**

*Art. 64, Vernon's Annotated Penal Code of the State of Texas:*

*"Art. 64 1621, 1017, 821 Second conviction for capital offense.*

"A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary."

**APPENDIX C**

*Art. 642, Vernon's Annotated Code of Crim. Procedure of the State of Texas:*

*"Article 642. 717, 697 Order of proceeding in trial*

*"A jury being impaneled in any criminal action, the cause shall proceed in the following order:*

1. The indictment or information shall be read to the jury by the attorney prosecuting.
2. The special pleas, if any, shall be read by the defendant's counsel, and if the plea of not guilty is also relied upon, it shall also be stated.
3. The State's attorney shall state to the jury the nature of the accusation and the facts which are expected to be proved by the State in support thereof.
4. The testimony on the part of the State shall be offered.
5. The nature of the defenses relied upon and the facts expected to be proved in their support shall be stated by the defendant's counsel.
6. The testimony on the part of the defendant shall be offered.
7. Rebutting testimony may be offered on the part party."

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1966

NO. 68

LEON SPENCER,

*Appellant*

v.

THE STATE OF TEXAS,

*Appellee*

APPEAL FROM  
THE COURT OF CRIMINAL APPEALS  
OF TEXAS

BRIEF FOR APPELLEE

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## INDEX

	Page
Opinion Below .....	1
Jurisdiction .....	1
No Prejudice to Appellant .....	3
Conflict of Circuit Court Opinions .....	4
Question Presented .....	4
Argument .....	5
Comparative Procedure .....	6
Conclusion .....	9
Certificate of Service .....	10

## CITATIONS

	Page
<b>Federal Statutes:</b>	
28 U.S.C., Secs. 2 and 3 .....	2
Rules 8(a) and 13, Federal Rules of Criminal Procedure .....	6
Rule 32(c) (2), Federal Rules of Criminal Procedure, Douglas Dissent to Amendment of Rules, 86 S.Ct. 208, 210 .....	7
<b>State Statutes:</b>	
Art. 64, Vernon's Ann. Penal Code of Texas .....	3
Art. 1257a, Vernon's Ann. Penal Code of Texas .....	5
Art. 21.24, Vernon's Ann. Code of Criminal Procedure 1965 .....	7
Art. 37.07, Vernon's Ann. Code of Criminal Procedure 1965 .....	2
<b>Cases:</b>	
Baker v. State, 368 S.W. 2d 627 .....	5
Brandenberg v. Steele (8 Cir. 1949), 177 F. 2d 279 ..	6
Breen v. Beto (5 Cir. 1965), 341 F. 2d 96 .....	4
Ginzburg v. U.S., 86 S.Ct. 942 .....	6
Goins v. U.S., 306 U.S. 622 .....	3
Lane v. Warden of Maryland Penitentiary (4 Cir. 1963), 320 F. 2d 179 .....	4, 7
Michelson v. U.S., 335 U.S. 469 .....	7, 8
Mishkin v. State of N. Y., 86 S.Ct. 958 (1966) .....	6
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 .....	2
Rojas v. State, 404 S.W. 2d 30 (1966) .....	2
Ruhlin v. N. Y. Life Ins., 304 U.S. 202 .....	4
U.S. v. Taylor (2 Cir. 1953), 207 F. 2d 437 .....	6
U.S. v. Yazell, 86 S.Ct. 500 (1966) .....	8
Wolfe v. Nash (8 Cir. 1963), 313 F. 2d 393, cert. den. 84 S.Ct. 705 (1964) .....	8
<b>Miscellaneous:</b>	
Stern, 66 Harvard Law Review, "Denial of Certiorari Despite a Conflict" .....	4



IN THE  
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BRIEF FOR APPELLEE

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TO THE HONORABLE SUPREME COURT OF  
THE UNITED STATES:

**Opinion Below**

The opinion of the Court of Criminal Appeals of Texas is reported in 389 S.W. 2d 304 (Appendix "A").

**Jurisdiction**

The question of jurisdiction was postponed to the hearing of the case on the merits.

This is an appeal from the Texas Court of Criminal

Appeals where appellant's judgment of conviction for the offense of murder with malice was affirmed.

Appellant seeks the jurisdiction of this Court by appeal under 28 U.S.C. 1257, Secs. 2 and 3.

The State of Texas agrees that the statements made by appellant Spencer concerning the history and steps on appeal are correct, but does not agree that this honorable Court should take jurisdiction.

Appellant cites *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, because he assumed the procedure of reading the indictment to the jury had been changed by the passage of Senate Bill 107, 59th Legislature, now Art. 37.07, Code of Criminal Procedure of Texas (1965).<sup>\*</sup> The State does not and cannot rely upon a repealed statute should this Court treat the appeal as an application for certiorari. The procedure was not changed in capital cases. The Court of Criminal Appeals of Texas so held in *Rojas v. State*, 404 S.W. 2d 30 (1966). The procedure before this case was tried and at the present time allows the reading of the entire indictment to the jury at the beginning of the trial. There is no alternate procedure in a capital case in Texas allowing assessment of penalty in a separate hearing after a finding of guilt on the primary offense.

Does this Court have to hear every case on the merits in which a defendant claims a statute of a state violates due process? If so, every time a state statute is enforced, all a defendant would have to do would be object that it violates the Fourteenth Amendment of the Constitution of the United States to confer jurisdiction on this Court.

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<sup>\*</sup>Appendix "B".

Spencer suggests that if this Court does not consider this a proper case for appeal it be treated as an application for certiorari.

### **No Prejudice to Appellant**

In *Goins v. United States*, 306 U.S. 622, certiorari was granted, but this Court found that the failure to give an instruction which led to the granting of the writ did not prejudice the petitioner.

The procedure in Texas did not prejudice Spencer. There was no defense offered to the murder. Eyewitnesses made the case. The opinion of the Court of Criminal Appeals (Appendix "A") recites some of the evidence which shows that he was separated from the deceased after they had lived together some four or five years. Spencer went to the home of the deceased, who was lying on a bed playing with her daughter's twenty-month old baby; he almost immediately fired a shot that hit her in the face, and she fell off of the bed. Deceased's daughter jumped over the bed and lay down on top of deceased to protect her. Spencer walked around the bed, pulled the daughter off and fired four more shots into the face and head of the deceased. Evidence was introduced that appellant had been drinking that day. It would be hard to conceive of a jury under the facts of this case not finding Spencer guilty.

Counsel for appellant apparently suggest this procedure; that the jury find him guilty, hear evidence of the prior conviction, then assess the punishment. Under Art. 64, Penal Code of Texas (Appendix "C"), the penalty is death or for life in the penitentiary. The jury assesses the penalty in capital cases in Texas. Before assessing the punishment, the indictment, un-

der appellant's theory, would be read, showing the prior conviction for murder. The jury would know this before assessing the penalty. It is hardly conceivable that a different result would follow.

Since appellant was not prejudiced by the procedure used, this Court should hold there is no substantial federal question.

### **Conflict of Circuit Court Opinions**

Although not briefed by appellant, this Court has sometimes granted certiorari where conflicting decisions have been reached by different circuits of the Courts of Appeals. This is apparently the general rule, but according to Stern in 66 Harvard Law Review, *Denial of Certiorari Despite a Conflict*, this Court has denied certiorari in cases involving federal prosecutions on the same facts where two Circuit Court opinions were in conflict.

In *Ruhlin v. New York Life Insurance*, 304 U.S. 202, 206, is found the following:

"As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting certiorari."

There is an apparent conflict between the 4th Circuit in *Lane v. Warden of Maryland Penitentiary*, 320 F. 2d 179 (1963), and the 5th Circuit in *Breen v. Beto*, 341 F. 2d 96 (1965).

The State submits that this should be controlled by state law and this Court should not take jurisdiction.

### **Question Presented**

Does the knowledge received by a jury of a prior

conviction through voir dire examination and the reading of the indictment constitute such a prejudice that would violate due process and prevent a fair trial?

### Argument

The evidence heretofore set out and in the Opinion of the Court of Criminal Appeals (Appendix "A") shows without a doubt appellant to be guilty of the offense of murder. As mentioned in appellant's brief, the trial court instructed the jury not to consider the prior conviction of appellant on the issue of guilt of the murder of Luvenia Irvine. Can it be said the jury ignored the instruction?

A witness for the state, Mary Wilson, testified that about three years before Spencer threatened the deceased (Cert. R. 106); that "... they were arguing in the room and he told her that if she don't shut up he would kill her like he did his first wife" (Cert. R. 107). The trial court sustained an objection to the latter statement and instructed the jury not to consider it. If the jury followed that instruction, the statement was not considered. This was admissible testimony in Texas under Art. 1257a, Penal Code (Appendix "D"), which provides in substance that the State or defendant shall be permitted to offer testimony to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and deceased. The Court of Criminal Appeals held under this Article in *Baker v. State*, 368 S.W. 2d 627, that the testimony of a son that the defendant threatened and struck his wife some six years before was admissible.

The State submits that admissible testimony was



available to show from Spencer's own statement that he killed his former wife, and the jury would not be unduly influenced by learning of a conviction for the act.

### Comparative Procedure

In the prosecution of a federal case, the prosecutor may allege any number of crimes in one indictment. Under this established practice, one case shows an information charging 225 separate and distinct crimes of transporting forged and false securities was upheld in *United States v. Taylor* (2 Cir. 1953), 207 Fed. 2d 437. During the last term of this Court, in *Ginzburg v. United States*, 86 S. Ct. 942, the conviction was affirmed which contained 28 counts of violating the Federal obscenity statute. The practice is so well settled in the federal courts it was not challenged.

In *Mishkin v. State of New York*, 86 S. Ct. 958 (1966), the information charged 159 counts of violation of the New York obscenity laws; there were 141 convictions for separate and distinct crimes.

It is submitted that this Court adopted the rule that permits a more prejudicial practice than that used in Texas. In *Brandenburg v. Steele* (8 Cir. 1949), 177 F. 2d 279, the defendant was indicted for 11 separate offenses of unlawful sale of narcotic drugs. The Circuit Court discussed Rules 8(a) and 13 which permit the joinder of two or more offenses. Rule 13 authorizes a consolidation of two or more indictments in a joint trial, it stated:

"... In view of the statute and the Rules prescribed by the Supreme Court above referred to, which authorized the procedure which resulted in the appellant's conviction, it is obvious that he is

entirely mistaken in his assertion about denial of due process. He was dealt with in accordance with long established and conventional federal procedure."

If this Court adopts the reasoning of *Lane v. Warden*, the practice of charging separate offenses in one indictment would be abolished. The jury hearing on indictment and proof of the sale of heroin on 8 separate times and places, or 28 separate counts charging separate and distinct obscenity crimes would show the defendant to be more of a criminal generally than the allegation on proof of a prior conviction.

The Texas practice allows several counts covering the same transaction, but only one conviction may be had. Separate and distinct offenses cannot be alleged in one indictment. Art. 21.24, Code of Criminal Procedure (Appendix "E"). The practice of alleging and reading the prior conviction, it is submitted, is not as prejudicial as a federal judge looking at a presentence report when the defendant has no absolute right to see it. Rule 32(c)(2). See Comment by Mr. Justice Douglas 86 S. Ct., 208, 210. In the Texas practice, the historical fact of prior conviction is alleged; the defendant knows what the jury considers in assessing punishment. If he was not the person convicted, he can file a motion to suppress and have it excluded. Where the penalty is absolutely fixed by law, the Court of Criminal Appeals prior to the adoption of S.B. 107 permitted defendants to stipulate the prior conviction or convictions and have the jury pass upon guilt. See Opinion of the Court of Criminal Appeals in this case (Appendix "A").

In *Michelson v. United States*, 335 U.S. 469, the Court held that the State may not show defendant's

prior trouble with the law and specific criminal acts or ill-name among his neighbors.

In a footnote to the *Michelson* case, this Court noted the exception "as when a prior crime is an element of the later offense, for example, at a trial for being an habitual criminal."

In *Wolfe v. Nash* (8 Cir. 1963), 312 Fed. 2d 393, cert. den. 84 S. Ct. 705 (1964), the Court, in dealing with the state habitual criminal statute regarded as a purely local legal problem and no national concern whatsoever, stated that "... the due process clause of the Fourteenth Amendment does not enable us to review errors of state law."

In *U. S. v. Yazell*, 86 S. Ct. 500 (1966), a plea of coverture was entered by Mrs. Yazell because at the time the contract was made with the Small Business Administration, she, a married woman in Texas, could not bind her separate property unless she had obtained a court decree removing her disability to contract. Mr. Justice Fortas, speaking for the Court, stated that the case presented an aspect of the continuing problem of the interaction of the federal and state laws in our complex federal system. The Court held that, under the circumstances of the case, the state rule governed. In the present case, the state submits that the state rule should govern.

The State of Texas submits that in the Texas practice there are rules beneficial to the defendant that the federal and other courts do not have; that there are rules in the federal courts and other state courts that are at times more beneficial to the defendant than the Texas courts have; the fact that some jurisdictions do not have a practice does not make unconstitutional

a practice used in another state. Some states have the death penalty; some states do not. Some jurisdictions permit a comment on the weight of the evidence; some do not. Some jurisdictions give shotgun charges to the jury; some do not permit the explosive charge. The appellee submits that these are matters for the state; that no constitutional provision has been violated.

### Conclusion

The appellee, the State of Texas, submits that there is no substantial federal question; that this Court should not entertain the appeal merely because appellant contended that the enforcement of our second offender capital statute violated due process; that this case should not be handled under the rules of certiorari merely because there is a conflict in decisions of the Circuit Courts involving state law. There is no prejudice to Spencer; the evidence was overwhelming as to his guilt; no defense was offered. The jury would have known of his prior convictions in advance of assessing the penalty, and the fact that the indictment was read containing the prior conviction paragraph could not have prejudiced the jury. The jury heard the evidence (which was later withdrawn) that he would kill the deceased like he killed his first wife; this was admissible. The State submits that fairness is a relative matter; that the practice in the Texas courts is less prejudicial to an accused than in the federal courts and other jurisdictions where 200 counts or more may be alleged in a single indictment for separate and distinct offenses; that this Court has recognized the rule that in habitual criminal cases where the prior conviction was an element of the offense these could be properly brought before the jury.

It is respectfully submitted, for the reasons stated above, that the judgment of the Court of Criminal Appeals of Texas should be affirmed.

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A copy of the above brief has been furnished to opposing counsel, Michael D. Matheny and Joe B. Goodwin, 635 San Jacinto Building, Beaumont, Texas.

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Date:-----



## APPENDIX "A"

LEON SPENCER, *Appellant*

No. 37,921 vs.

APPEAL FROM

THE STATE OF TEXAS,

JEFFERSON COUNTY

*Appellee*

### OPINION

The offense is murder; the punishment, enhanced under Art. 64, V.A.P.C., death.

Art. 64, V.A.P.C., provides that a person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary.

The testimony reflects that appellant and deceased had lived together for about four or five years and had separated in October or November, 1963. On January 7, 1964, around 7:30 P.M., deceased was at her home in the City of Beaumont with her two sons, aged fourteen and eight, and her daughter, about eighteen years of age, and her daughter's twenty month old baby. As deceased was lying on the bed playing with the baby the appellant walked into the house, entered the room where deceased was and almost immediately fired one shot with a pistol. The shot hit deceased in the face, and she fell off the bed. Deceased's daughter, who was in the room at the time this occurred jumped over the bed and lay down on top of deceased to protect her. At that time appellant walked around the bed, pulled deceased's daughter up and fired four more shots into

deceased's face and head. Appellant was attacked at that time by deceased's fourteen year old son who had seen part of this occurrence. Appellant knocked the knife out of the son's hand and walked out of the front door of the house where he stopped and appeared to be either loading or unloading the pistol. The deceased's daughter ran out of the house after him and when she fell down, appellant looked back at her and told her her mother was no good and then he grinned.

After leaving the house where the shooting occurred, appellant walked into the Sheriff's Office at approximately 8:15 P.M. and had in his possession a .22 caliber pistol containing three live shells and three spent cartridge cases. This pistol was proved to have been purchased by the appellant from Phillips Pawn Shop in the City of Beaumont between 4:00 P.M. and 5:30 P.M. on January 7, 1964.

The cause of the deceased's death was established by medical testimony showing that she had died as a result of gunshot wounds to the brain.

The State proved that the defendant had been previously convicted of the offense of murder with malice as alleged in the indictment.

We find the evidence sufficient to sustain the verdict.

Appellant offered to stipulate, prior to the trial, that he had been previously convicted of murder as alleged in the second count of the indictment. Upon making this offer appellant moved the trial court to instruct the state not to read the portion of the indictment which referred to the prior conviction and not to offer any proof of said prior conviction, which motion was denied.

Appellant also objected to the reading of the indictment, and after the reading of the indictment alleging the prior conviction, he moved for a mistrial and also objected to any and all testimony in regard to the first conviction.

Appellant bottoms the foregoing contentions upon the theory that the trial court denied him due process of law by sanctioning this procedure on the part of the state before the determination of his guilt on the primary offense. He contends that there was no fact issue for the determination of the jury as to his identity or the validity of the prior conviction.

Appellant also contends that Art. 64, V.A.P.C., is unconstitutional for the reason that it places the accused in double jeopardy in that this statutory provision uses the fact of the preceding offense to establish an element of the primary offense.

We shall dispose of these three related contentions together, as the parties have done in their briefs. We have consistently held that the procedure of reading an indictment to a jury showing that the person on trial has been previously convicted is not a violation of due process of law. We held in *Wright v. State*, 364 S.W. 2d 384, a case in which the appellant there offered to judicially confess and stipulate as to his former conviction instead of the state offering proof of the prior conviction, that the state could not be prevented from making proof of the prior alleged conviction. Wright's conviction was under Art. 64, V.A.P.C.

In *Pitcock v. State*, 367 S.W. 2d 864, this Court, speaking through this scrivener, did announce a new

rule in those cases where "the jury has no choice in imposing punishment if it finds the appellant guilty and that he has been previously convicted." We said: "Thus, if accused stipulates the prior conviction, that issue is resolved and the question of guilt is all that remains." We are convinced of the soundness of this rule, but it is not applicable to cases coming under Art. 64, *supra*. The jury does have a choice in imposing punishment under Art. 64, as may be seen from the foregoing terms of this article.

Since appellant's contentions have been before this Court numerous times, we shall not enter into a detailed discussion. His contentions have been adversely decided by this Court in the rather recent case of *Crocker v. State*, 385 S.W. 2d 392, and the very recent case of *Wigginton v. State*, No. 37,645, and cases there cited.

We adhere to these prior holdings and overrule appellant's contentions.

We have examined with great care appellant's remaining contentions, but we find no error reflected by them. It would contribute nothing to the jurisprudence of this state by discussing them here.

Finding no reversible error, the judgment is affirmed.

McDonald, Presiding Judge

(Delivered March 17, 1965.)

## **APPENDIX "B"**

### **Art. 37.07 [693] [770] [750] Verdict must be general; separate hearing on proper punishment**

1. The verdict in every criminal action must be general. When there are special pleas on which a jury is to find, it must say in its verdict that the allegations in such pleas are true or untrue. If the plea is not guilty, it must find that the defendant is either guilty or not guilty.

#### **2. Alternate procedure.**

(a) In felony cases less than capital and in capital cases where the State has made it known that it will not seek the death penalty, and where the plea is not guilty, the judge shall, before the argument begins, first submit to the jury the issue as to the guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed; provided, however, that in the charge which submits the issue of guilt or innocence there shall be included instructions showing the jury the punishment provided by law for each offense submitted.

(b) If a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense charged where the same is not absolutely fixed by law to some particular penalty except when the defendant, upon the return of a finding of guilty, requests that the punishment be assessed by the same jury. In the event the defendant elects to have the jury fix the punishment in cases where the punishment is fixed by law, the court shall



instruct the jury that if they find the defendant is the same person who was convicted in the prior conviction or convictions alleged for enhancement, they should set his punishment as prescribed by law.

Regardless of whether the punishment be assessed by the judge or the jury, evidence may be offered by the State and the defendant as to the prior criminal record of the defendant, his general reputation and his character.

(c) After the introduction of such evidence has been concluded, and if the jury has been selected to assess the punishment, the court shall give such additional written instructions as may be necessary and the order of procedure and the rules governing the conduct of the trial shall be the same as are applicable on the issue of guilt or innocence.

(d) In cases where the matter of punishment is referred to the jury, the verdict shall not be complete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment, where the jury finds the defendant guilty. In the event the jury shall fail to agree, a mistrial shall be declared, the jury shall be discharged, and no jeopardy shall attach.

(e) When the judge assesses the punishment, and after the hearing of the evidence hereinabove provided for, he shall forthwith announce his decision in open court as to the punishment to be assessed.

(f) Nothing herein shall be construed as affecting the admissibility of extraneous offenses on the question of guilt or innocence.

## APPENDIX "C"

Article 64, Vernon's Annotated Penal Code of the State of Texas:

*"Second Conviction for capital offense.*

"A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary."

## APPENDIX "D"

Article 1257a, Vernon's Annotated Penal Code of the State of Texas:

*"Evidence*

"In all prosecutions for felonious homicide the State or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the homicide, which may be considered by the jury in determining the punishment to be assessed. Provided, however, that in all convictions under this Act and where the punishment assessed by the jury does not exceed five years, the defendant shall have the benefits of the suspended sentence act."

## APPENDIX "E"

### Article 21.24, Code of Criminal Procedure 1965:

*"May contain several counts but only one offense*

"An indictment, information or complaint may contain as many counts charging the same offense as the attorney who prepares it, acting in good faith, may think necessary to insert, but may not charge more than one offense. An indictment or information shall be sufficient if any one of its counts be sufficient."

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IN THE SUPREME COURT OF THE UNITED STATES DAVIS, CLERK

OCTOBER TERM, 1966

No. 69

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ROBERT A. BELL, JR.,

*Petitioner,*

VS.

THE STATE OF TEXAS,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE COURT OF  
CRIMINAL APPEALS OF TEXAS

---

**BRIEF FOR THE PETITIONER**

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# INDEX

## SUBJECT INDEX

	Page
<b>BRIEF FOR THE PETITIONER</b>	
Opinion Below .....	1
Jurisdiction .....	1
Question Presented .....	2
Constitutional and Statutory Provisions Involved ....	2
Statement .....	3
Summary of Argument .....	5
Argument .....	5
Conclusion .....	20

## TABLE OF AUTHORITIES CITED

### CASES:

<i>Bell v. State of Texas</i> , 387 S.W.2d 411 (Tex. Crim. App., 1965) .....	1
<i>Betts v. Brady</i> , 316 U.S. 455, 462, 62 S.Ct. 1252 (1942) .....	11
<i>Boyd v. United States</i> , 142 U.S. 450, 12 S.Ct. 292 (1892) .....	6
<i>Breen v. Beto</i> , 341 F.2d 96 (5th Cir., 1965) ....	12
<i>Estes v. State of Texas</i> , 381 U.S. 532, 85 S.Ct. 1628 (1965) .....	9
<i>Ex parte Reyes</i> , 383 S.W.2d 804 (Tex. Crim. App., 1964) .....	14
<i>Graham v. West Virginia</i> , 224 U.S. 616, 32 S.Ct. 583 (1912) .....	13, 15, 18
<i>Krulewitch v. United States</i> , 336 U.S. 440, 69 S.Ct. 716 (1949) .....	19



	Page
<i>Lane v. Warden, Maryland Penitentiary</i> , 320 F.2d 179 (4th Cir., 1963) .....	11, 14
<i>McDonald v. State</i> , 385 S.W.2d 253 (Tex. Crim. App., 1964) .....	14
<i>Marshall v. United States</i> , 360 U.S. 310, 79 S.Ct. 1171 (1959) .....	6
<i>Michelson v. United States</i> , 335 U.S. 469, 475, 69 S.Ct. 213, 218 (1948) .....	6, 12, 13
<i>Oler v. State</i> , 378 S.W.2d 857 (Tex. Crim. App., 1964) .....	14
<i>Oyler v. Boles</i> , 368 U.S. 488, 82 S.Ct. 501 (1962) .....	13
<i>Pitcock v. State</i> , 367 S.W.2d 865 (Tex. Crim. App., 1963) .....	14
<i>Salinas v. State</i> , 365 S.W.2d 362 (Tex. Crim. App., 1963) .....	14
<i>Seay v. State</i> , 395 S.W.2d 40 (Tex. Crim. App., 1965) .....	8
<i>Sheppard v. Maxwell</i> , U.S., 86 S.Ct. 1507 (1966) .....	11
<i>Skidmore v. Baltimore &amp; O. R. Co.</i> , 167 F.2d 54 (2d Cir., 1948) .....	19
<i>State v. Ferrone</i> , 96 Conn. 160, 113 Atl. 452 (1921) .....	16, 18
<i>Turner v. Louisiana</i> , 379 U.S. 466, 85 S.Ct. 546 (1965) .....	19
<i>United States v. Banmiller</i> , 310 F.2d 720 (3rd Cir., 1962) .....	11, 19
<i>United States v. Jacangelo</i> , 281 F.2d 574 (3rd Cir., 1960) .....	7
<i>Wolfe v. Nash</i> , 313 F.2d 393 (8th Cir., 1963) ....	12

#### CONSTITUTION OF THE UNITED STATES:

Fifth Amendment to the United States Constitution .....	2, 4, 5
Sixth Amendment to the United States Constitution .....	2, 4, 5

Fourteenth Amendment to the United States Constitution .....	Page 2, 4, 5
--	-----------------

STATUTES OF THE STATE OF TEXAS:

Texas Annot. Code of Criminal Procedure, Art. 642 (repealed January 1, 1966) .....	3
Texas Annot. Code of Criminal Procedure, Art. 36.01 (effective January 1, 1966) .....	17
Texas Annot. Code of Criminal Procedure, Art. 37.07 (effective January 1, 1966) .....	18
Texas Annot. Penal Code, Art. 62 .....	3

MISCELLANEOUS:

1 Wharton's Criminal Evidence, Section 232 ....	6
---	---

**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1966**

**No. 69**

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**ROBERT A. BELL, JR.,**

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**vs.**

**THE STATE OF TEXAS,**

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**ON WRIT OF CERTIORARI TO THE COURT OF  
CRIMINAL APPEALS OF TEXAS**

---

**BRIEF FOR THE PETITIONER**

---

**Opinion Below**

The opinion of The Court of Criminal Appeals of Texas, which begins on page 38 of the Record, has been reported at 387 S.W.2d 411.

**Jurisdiction**

The judgment of The Court of Criminal Appeals of Texas was entered February 3, 1965, and rehearing denied on March 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

### **Question Presented**

Whether in a trial for robbery the petitioner was denied a trial before an impartial jury and thereby deprived of his liberty without due process of law when the state informed the jury of the petitioner's prior criminal conviction, offered proof of such conviction and submitted a charge to the jury which required them to consider the allegation of the prior conviction and the evidence of such conviction at the same time they were considering the petitioner's guilt or innocence on the primary offense of robbery.

### **Constitutional and Statutory Provisions Involved**

This case involves the following constitutional and statutory provisions:

The Fifth Amendment to the Constitution of the United States:

"No persons shall be . . . deprived of life, liberty, or property without due process of law. . . ."

The Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

The Fourteenth Amendment to the Constitution of the United States:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; or shall any State deprive any person of life, liberty, or property without due process of law...".

Article 62, Vernon's Penal Code of the State of Texas:

"If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases."

Article 642 of the Texas Code of Criminal Procedure (repealed effective January 1, 1966):

"A jury being impaneled in any criminal action, the cause shall proceed in the following order:

1. The indictment or information shall be read to the jury by the attorney prosecuting.

• • • • •

4. The testimony on the part of the State shall be offered."

### **Statement**

By indictment returned in the District Court of Upton County, Texas, the petitioner was charged with robbery. In the indictment it was alleged in full detail that the petitioner had been previously convicted of bank robbery in the United States District Court for the Victoria Division of the Southern District of Texas (R. 1-2).



On August 12, 1964 the petitioner was brought to trial before a jury. Prior to the reading of the indictment to the jury, petitioner's counsel moved to quash the indictment on the ground that the allegation of the prior offense was prejudicial and inflammatory and denied the petitioner a fair and impartial jury. It was specifically urged that the reading of the indictment amounted to a deprivation of due process in contravention of the Sixth, Fifth and Fourteenth Amendments to the Constitution of the United States (R. 4). This motion was overruled.

Following the reading of the indictment to the jury, the state offered documentary evidence of the petitioner's prior conviction. Counsel for petitioner renewed the objection to this evidence on the grounds previously stated in the motion to quash (R. 16). The objection was overruled and the documents detailing the alleged prior conviction were read to the jury and given to them as exhibits (R. 10-20).

The first witness for the state was a fingerprint expert from the Texas Department of Public Safety who testified that he had taken the fingerprints of the petitioner and that they were the same as the fingerprints shown on the prison record card (R. 21).

The remainder of the evidence introduced related to evidence on the offense alleged in the indictment and the petitioner's prior mental history. The petitioner did not take the stand. He did not offer character evidence.

The court's charge (R. 25) referred to the alleged prior conviction and in paragraph 12 (R. 29-31) required the jury to consider the alleged prior offense in conjunction with the offense of robbery for which the petitioner was on trial. Counsel for petitioner objected to the charge on the

grounds previously raised (R. 33). This objection was overruled (R. 33) and the charge read to the jury.

The defendant was found guilty, found to be the same person who had committed the prior offense (R. 34), and sentenced to life imprisonment (R. 35).

The question presented by this brief was presented to The Court of Criminal Appeals of Texas. That Court affirmed the conviction (R. 38).

### **Summary of Argument**

In this appeal the validity of the state sentence is attacked under the Fifth, Sixth and Fourteenth Amendments on the ground that the impartiality of the jury was destroyed by the state's action in alleging and offering proof of the prior offense and by the charge which required the jury to consider the prior offense contemporaneously with the offense for which the defendant was on trial. We do not contend that recidivist legislation such as Article 62 of the Texas Penal Code is unconstitutional. We do contend that the procedure used in this case for the introduction of evidence of the prior offense is so likely to sway the jury as to amount to a denial of due process.

### **Argument**

Petitioner asserts that he was denied a fair trial by the Texas procedure which informed the jury of the details of the prior conviction and required the submission of a charge that required the jury to consider the evidence of the prior conviction in conjunction with the evidence of the

offense with which he was charged and the evidence on petitioner's defense of insanity.

It is well established that evidence or allegations of a prior conviction are inadmissible to show that the defendant would be likely to commit the crime with which he is charged. *Michelson v. United States*, 335 U.S. 469, 475, 69 S. Ct. 213, 218 (1948). 1 *Wharton's Criminal Evidence*, Section 232 (12th ed. 1955). The probative value of evidence is deemed to be outweighed by its prejudicial effect.

This Court has consistently guarded the accused's right to be tried for the crime with which he is charged.

In *Boyd v. United States*, 142 U.S. 450, 12 S. Ct. 292 (1892) it was stated:

. . . Proof of them (prior offenses) only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.

In *Marshall v. United States*, 360 U.S. 310, 79 S. Ct. 1171 (1959) the Court exercised its supervisory power in a fed-

eral criminal prosecution to overrule a conviction by a jury seven members of which had read a newspaper account of the petitioner's prior conviction. This action was taken notwithstanding the fact that the jurors who had read the article had been interrogated by the judge and had assured him that they could consider the case without prejudice toward the petitioner. In reversing the conviction, the Court states:

... We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. *Michelson v. United States*, 335 U.S. 469, 475, 69 S.Ct. 213, 218, 93 L.Ed. 168. It may indeed be greater for it is then not tempered by protective procedures. 360 U.S. at 312, 79 S.Ct. 1173

The Courts of Appeals have also guarded defendants from this species of prejudicial evidence. In *United States v. Jacangelo*, 281 F. 2d 574 (3rd Cir. 1960) the court held that the reading of a co-defendant's confession containing references to the petitioner's prior conviction was prejudicial. The court states:

... (T)he evidence of involvement in other crimes was intrinsically inadmissible as highly prejudicial information about a collateral matter not connected with the offense charged. (Citations omitted.) This was a far more serious matter than the technical objection to the statement as hearsay. To inform the jury of prior crimes of a defendant is, in the view of the Su-



preme Court, so improper and so prejudicial that a mistrial must be declared, even when the jurors assert that they can and will disregard that information.

... (W)e think he should not have been subjected to additional risk of unwarranted harm through the pointless and wholly unnecessary disclosure of his prior complicity in crime. Therefore, scrupulous concern that criminal jury trials be safeguarded as far as possible against prejudicial influences, dictates that the appellant be granted a new trial. 281 F.2d at 576-577.

In other contexts The Texas Court of Criminal Appeals recognizes the prejudicial effect of such testimony. In the recent case of *Seay v. State*, 395 S.W. 2d 40 (Tex. Crim. App. 1965) the prosecutor in oral argument responded to a defense argument that the defendant had never been convicted of a prior offense by "testifying" that the defendant had been convicted of swindling, theft and drunkenness. In reversing the case the court, speaking through presiding Judge McDonald, states:

... So far as we can determine, the error brought forward in this case is one of first impression in this state. We entertain no doubt that the prosecutor was given far greater latitude in replying than he was entitled to do. If the state is precluded from establishing by evidence specific prior offenses committed by an appellant or charged against an appellant in a case of this kind, and we readily agree that the state is prohibited from so doing, how then can the state adduce such proof at the time of its argument to the jury, or argue such specific offenses or charges? The state



cannot do so. We do not feel that such an extension of judicial authority is necessary to protect the rights of the state, nor would such an extension insure a fair and impartial trial to a defendant. The remarks made by the prosecutor or the facts testified to by the prosecutor in this case (it is difficult from the record to determine whether the prosecutor was a witness or an advocate) were improperly admitted. *Such remarks or evidence were no doubt highly inflammatory and prejudicial to appellant and stripped him of the fair and impartial trial that he was entitled to receive.* (Emphasis Added) 395 S.W. 2d 45

The standard against which the danger of prejudice in cases such as this is to be measured is summarized in *Estes v. State of Texas*, 381 U.S. 532, 85 S.Ct. 1628 (1965) as follows:

... It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. Such a case was *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), where Mr. Justice Black for the Court pointed up with his usual clarity and force:

'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness...

(T)o perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (99 L.Ed. 11).' At 136, 75 S.Ct. at 625. (Emphasis supplied.)

And, as Chief Justice Taft said in *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, almost 30 years before:

'the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.' At 532, 47 S.Ct. at 444. (Emphasis supplied.)

This rule was followed in *Rideau*, *supra*, and in *Turner v. State of Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed. 2d 424 (1965). In each of these cases the Court departed from the approach it charted in *Stroble v. State of California*, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872, (1952), and in *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. Likewise in *Gideon*

v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and *White v. State of Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963), we applied the same rule, although in different contexts. 381 U.S. at 542, 85 S.Ct. at 1632

The standard of these cases was again applied in the last term of this Court in *Sheppard v. Maxwell*, U.S., 86 S.Ct. 1507 (1966).

Thus, the question presented is whether prejudice probably resulted from submitting the questions of the prior offense to the jury at a time when it was considering the guilt or innocence of the petitioner.

In *Lane v. Warden, Maryland Penitentiary*, 320 F.2d 179 (4th Cir., 1963) the court made a full review of the state and federal authorities on the question, and held the procedure employed in that case, which was identical with the procedure used in the case at bar, to be a denial of due process.

The same result was reached in *United States v. Ban-miller*, 310 F.2d 720 (3rd Cir., 1962). While that case limited its holding to capital cases in reliance upon the now discarded capital-non-capital dichotomy of *Betts v. Brady*, 316 U.S. 455, 462, 62 S.Ct. 1252 (1942), it is clear that the court regarded the procedure as being prejudicial. In discussing the instruction of the Court to the jury that they should disregard the allegations of the prior conviction in determining guilt or innocence on the primary offense the court states:

... Certainly such a feat of psychological wizardry verges on the impossible even for berobed judges. It

is not reasonable to suppose that it could have been accomplished by twelve laymen brought together as a jury. The admission of such evidence in Scoleri's trial must therefore be deemed to have been gravely prejudicial. We conclude that Scoleri's trial in this respect was so fundamentally unjust as to cause the trial court to lose jurisdiction. 310 F.2d 725

Those courts which have upheld procedures akin to that involved in this case have done so with scant discussion of the prejudicial effect of the introduction of the prior convictions. In *Wolfe v. Nash*, 313 F.2d 393 (8th Cir., 1963) the court chose to dismiss the argument as "unpersuasive" without citation of authority. In *Breen v. Beto*, 341 F.2d 96 (5th Cir., 1965), the Court dismissed with the statement that, "(W)e are of the firm view that the case was not well decided. . ."

The question is one of first impression in this Court.

Footnote 8 in *Michelson v. United States*, 335 U.S. 469, 475, 69 S.Ct. 213, 218 (1948) has been advanced by the state in its reply to the petition for certiorari in this case as approval of the procedure here involved. The footnote is to the following statement:

The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.\*

The relevant portion of the footnote states:

\* This would be subject to some qualification, as when a prior offense is an element of the latter offense; for example at a trial for being an habitual criminal.



This language is directed to admissibility *per se*, not to the question of the stage of the proceeding at which such evidence is to be admitted. Certainly evidence of a prior offense would be admissible at a separate hearing for the purpose of determining whether or not the defendant was an habitual criminal. Such a procedure was approved on *Oyler v. Boles*, 368 U.S. 488, 82 S.Ct. 501 (1962). Footnote 8 to *Michelson* is not a holding on the question raised by the case at bar.

There is language in *Graham v. West Virginia*, 224 U.S. 616, 32 S.Ct. 583 (1912) which might be cited as approval of the procedure here in question. West Virginia had a procedure which permitted the state to charge a defendant as being a multiple offender after a finding of guilt on the second or subsequent offense. The petitioner, who had pled guilty to a second offense at a time when there was no indication that the state would seek an enhanced penalty, contended that if the state wished to inflict a greater penalty upon him as a multiple offender it should be required to give notice of its intent to seek the greater penalty prior to a trial on the merits for the second offense. In the course of the opinion it is stated:

... Although the state may properly provide for the allegation of the former conviction in the indictment, for a finding by the jury on this point in connection with its verdict as to guilt, and thereupon for the imposition of the full sentence prescribed, there is no constitutional mandate which requires the state to adopt this course even where the former conviction is known. It may be convenient practice, but it is not obligatory. 32 S.Ct. 588



The contention of the petitioner must be kept in mind in reading this statement. The petitioner was contending that the state had to inform him of its intent to enhance the penalty. The court is simply stating that while such notice may be given it does not have to be given. As will be discussed below there are alternative procedures by means of which the prior conviction can be alleged in the same indictment as the primary charge and the two issues tried in separate hearings before the same jury. The Court in this case did not have before it the question of whether a procedure such as that involved in the case at bar would deny the defendant a fair trial. Its statement should be read in context and applied in conjunction with the alternative procedures which it cites with approval.

The Texas Court of Criminal Appeals has not denied the prejudicial effect of evidence of prior convictions. In *Oler v. State*, 378 S.W. 2d 857 (Tex. Crim. App., 1964) the Court cites *Lane* as being persuasive but declines to follow it on the ground that the court did not have "rule making" powers.

The prejudicial effect of such evidence was recognized by the Texas Court in the cases of *Pitcock v. State*, 367 S.W. 2d 865 (Tex. Crim. App., 1963) *Ex parte Reyes*, 383 S.W.2d 804 (Tex. Crim. App., 1964) *McDonald v. State*, 385 S.W.2d 253 (Tex. Crim. App., 1964) and *Salinas v. State*, 365 S.W. 2d 362 (Tex. Crim. App., 1963) which hold that it is error for the state to read the allegations of the prior offense to the jury if the defendant stipulates that he was convicted of the prior offenses. In *Pitcock* it is stated that the allegations of the prior offenses are to be omitted in order to avoid possible prejudice to the accused. If such information is prejudicial to the defendant who stipulates

it is prejudicial to the defendant who does not stipulate. The Constitutional guarantee of a fair trial is a right to be enjoyed by all, not a privilege to be purchased at the price of stipulations to the state's case.

The prejudice engendered by the procedure involved in this case is aggravated by the fact that it is unnecessary. Protective procedures have been in use for at least 130 years. In *Graham v. West Virginia*, 224 U.S. 616, 32 S.Ct. 583 (1912) the Court gives the following description of an 1836 English statute:

. . . It was established by statute in England that, although the fact was alleged in the indictment, the evidence of the former conviction should not be given to the jury until they had found their verdict on the charge of crime. The act of 6 & 7 Wm. IV. chap. 111, provided that it should "not be lawful on the trial of any person for any such subsequent felony to charge the jury to inquire concerning such previous conviction until after they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same; and whenever in any indictment such previous conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding, as aforesaid." Exception was made in cases where the accused gave evidence of good character to meet the charge of crime, whereupon the prosecutor might show the former conviction before the verdict of guilty had been returned. And in *Reg. v. Shuttleworth*, 3 Car. & K. 375, 376, Lord Campbell thus stated the practice under the statute: "It is the opinion of all the judges: The prisoner is to be arraigned on the whole indict-

ment, and the jury are to have the new charge only stated to them; and if no evidence is given as to character, nothing is to be read to the jury of the previous conviction till the jury have given a verdict as to the new charge. The jury, without being resworn, are then to have the previous conviction stated to them; and the certificate of it is to be put in, and the prisoner's identity proved." See 24 & 25 Vict. chap. 96, Section 116. 32 S.Ct. 586

The procedure advocated by the English authorities was adopted by Connecticut in *State v. Ferrone*, 96 Conn. 160, 113 Atl. 452 (1921). The reasoning behind this change is forcefully stated as follows:

... It cannot be believed that an accused man would ever have a fair trial, resulting in a verdict not affected by prejudice or by considerations by which the jury should not be influenced, if during that trial allegations that he has twice before been convicted of state prison crimes have been read to the jury, and evidence of his former convictions has been placed before them. It is beyond question that knowledge of such facts must necessarily prejudice the minds of his triers against the accused, and cause him more serious injury than that which he would suffer from any improper remarks of the state's attorney. No one would claim that in a trial for a specific crime evidence of another crime committed by the accused could be admitted for the purpose of proving his guilt of the crime alleged . . . A man is not to be convicted of one crime by proof that he is guilty of another. Therefore our law sedulously guards against the introduction of evidence of any matter immaterial or irrelevant to the single issue

to be determined. The purpose of these salutary laws might often be defeated if the minds of the jurors were subjected to the influence of facts or considerations having no legitimate bearing on the only question they have to decide, and their verdict be reached under the impulse of passion, sympathy, or resentment. Such a verdict is illegal and will be set aside. (Citations) The rule everywhere enforced excludes not only evidence of another crime, but also evidence tending to degrade the accused, to prejudice the jury against him, to divert their minds from the real issue which they have to determine, or to persuade them by matters which they have no legal right to consider that the accused, for reasons other than those based upon legitimate evidence, was more likely to have committed the particular crime for which he is on trial. . . . (s)uch an information as this presents two separate issues, and the issue of former convictions does not relate to the issue of the commission of the specific crime alleged, and for which only the accused is to be tried, and the fact of former convictions does not tend in any way to prove the commission of the crime charged. It follows that, until the verdict of the jury on the principal issue has been rendered, no knowledge of the alleged previous conviction should reach them, either by reading that part of the information in which they are recited or by evidence relating to them. If the verdict on the principal issue be guilty, then the second issue may be submitted to the jury. ¶113 Atl. at 457)

With its revised Code of Criminal Procedure, Texas has joined those states which provide a fair procedure in cases such as this. Article 36.01 of the Texas Code of Criminal Procedure provides:



... A jury being impaneled in any criminal action, the cause shall proceed in the following order:

1. The indictment or information shall be read to the jury by the attorney prosecuting. When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07.

Article 37.07 is a general statute providing for the presentation of evidence regarding the accused's record at a post-conviction hearing. Thus the Texas practice is now the same as the English procedure discussed in *Graham* and adopted by the Connecticut court in *State v. Ferrone*. The defendant is given notice of the state's intent to proceed under the recidivist statute but the jury is in no way informed of the alleged prior offense unless and until it finds him guilty of the offense for which he is on trial.

We do not overlook the paragraph 13 of the charge (R. 31) which instructs the jury as follows:

... You are further charged that even though you may find and believe from the evidence beyond a reasonable doubt that the defendant committed and was convicted of the offense charged in the second paragraph of the indictment herein, yet, you are instructed that you cannot consider such commission, if any, or conviction, if any, or any evidence relating thereto, if any, in passing upon the issue of the guilty, if any, or the innocence, if any, of the defendant for the offense set out in the first paragraph of the indictment herein.



This is but one of those futile rituals described by Judge Frank in *Skidmore v. Baltimore & O. R. Co.*, 167 F.2d 54, 61 (2d Cir., 1948) (footnote 15d). To consider it, or any other instruction, a procedural safeguard in this context would be but an indulgence of an assumption of the character dismissed by Justice Jackson in his frequently quoted concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723 (1949).

As noted by Chief Judge Biggs in *United States v. Banmiller*, 310 F.2d 720 (3rd Cir., 1962) in the passage quoted above, instructions such as this call for dimensions of dispassion found in few of us.

In this case the state has used a procedure which unnecessarily injects prejudicial statements at every phase of the trial. In *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546 (1965) this Court struck down the practice of permitting deputy sheriffs to double as witnesses and jury shepherds for the reason that there was the danger of probable prejudice to the accused. Surely the danger of prejudice in that case is less than presented by the case at bar.

**Conclusion**

For the reasons stated it is respectfully submitted that the judgment in this case should be reversed and the case remanded to The Court of Criminal Appeals of Texas for further proceedings not inconsistent with the decision of this Court.

Respectfully submitted,

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NO. 69

JOHN F. DAVIS, CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1966

ROBERT A. BELL, JR.,

*Petitioner*

VS.

THE STATE OF TEXAS,

*Respondent*

On Writ of Certiorari to the Court of Criminal  
Appeals of Texas

**BRIEF FOR THE RESPONDENT**

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## TABLE OF CONTENTS

	Page
Opinion Below .....	1
Jurisdiction .....	1
Question Presented .....	2
Constitutional and Statutory Provisions Involved .....	2
Statement of Facts .....	2
Arguments and Authorities .....	2
Conclusion .....	13
Certificate of Service .....	14
Appendix "A" .....	15

# LIST OF AUTHORITIES

Page

## Cases

Baltimore Radio Show v. State, 67 A. 2d 497, 510	9
Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942)	10
Brandenburg v. Steele, 177 F. 2d 279 (8th Cir. 1949)	7
Braggs v. United States, 176 F. 2d 317, 321 (10th Cir. 1949) cert. den. 338 U.S. 861	9
Breen v. Beto, 341 F. 2d 96 (5th Cir. 1965)	3
Finnegan v. United States, 204 F. 2d 105 (8th Cir. 1953) cert. den. 346 U.S. 821, reh. den. 346 U.S. 880	8
Gianotos v. United States, 104 F. 2d 929 (8th Cir. 1939)	9
Gideon v. Wainwright, 372 U.S. 335	10
Ginzburg v. United States, — U.S. —, 34 L.W. 4255 (1966)	8
Gore v. United States, 244 F. 2d 763 (C.A.D.C. 1957), affirmed 357 U.S. 386	8, 9
Henderson v. Warden, 248 F. Supp. 917 (4th Cir. 1965)	10
Huff v. United States, 273 F. 2d 56 (5th Cir. 1959)	6
Johnson v. New Jersey, — U.S. —, 34 L.W. 4592 (decided June 20, 1966)	11
Lane v. Warden, Maryland Penitentiary, 320 F. 2d 179 (4th Cir. 1963)	2, 3, 4, 5, 6, 7, 8, 9, 10
Linkletter v. Walker, 381 U.S. 618 (1965)	11
Mackie v. State, 367 S.W. 2d 697 (1963)	5



# **LIST OF AUTHORITIES—Continued**

	Page
<b>Cases</b>	
Michelson v. United States, 335 U.S. 469 (1948) .....	5, 6
Mishkin v. New York, — U.S. —, 84 L.W. 4250 (1966) ....	8
Reed v. Beto, 343 F. 2d 723 .....	3
Reed v. State, 353 S.W. 2d 850 (June 10, 1962) .....	12
Reyes v. Beto, 345 F. 2d 722 .....	3
Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) .....	12
Roe v. United States, 316 F. 2d 617 (5th Cir. 1963) ....	6
Wendell Odell Stephens v. Beto, 377 S.W. 2d 139 (1964) cert. den. 350 U.S. 980, 85 S. Ct. 1344, April 26, 1965 .....	3
Taylor v. Beto, 346 F. 2d 157 .....	3
Tehan v. Shott, 382 U.S. 406 (1966) .....	11
United States v. Banmiller, 310 F. 2d 720 (3rd Cir. 1962) cert. den. 374 U.S. 828, 83 S. Ct. 1866 .....	10
United States v. Pullings, 321 F. 2d 287 (7th Cir. 1963) ..	8
United States v. Rabin, 316 F. 2d 564 (7th Cir. 1963) ....	8
United States v. Taylor, 207 F. 2d 437 (2d Cir. 1953) ..	7
Williams v. United States, 317 F. 2d 545 (C.A.D.C. 1963) ..	8
Wolfe v. Nash, 313 F. 2d 393 (8th Cir. 1963), cert. den. 376 U.S. 933, 84 S. Ct. 706 (Feb. 24, 1964) .....	4, 5
<b>Constitution</b>	
<b>United States</b>	
Sixth Amendment .....	2
Fourteenth Amendment .....	2, 10

# LIST OF AUTHORITIES—Continued

Page

## Statutes

### Texas

Article 36.01, Texas Code of Criminal Procedure, 1966 . . . 12

Article 37.07, Texas Code of Criminal Procedure, 1966 . . . 12

Article 62, Vernon's Annotated Penal Code . . . . . 2

### Rules

#### Federal

Rule 8, Federal Rules of Criminal Procedure . . . . . 7

Rule 8(a), Federal Rules of Criminal Procedure . . . . . 7

Rule 13, Federal Rules of Criminal Procedure . . . . . 7

NO. 69

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1966

ROBERT A. BELL, JR.,

*Petitioner*

VS.

THE STATE OF TEXAS,

*Respondent*

On Writ of Certiorari to the Court of Criminal  
Appeals of Texas

**BRIEF FOR THE RESPONDENT**

TO THE HONORABLE SUPREME COURT OF  
THE UNITED STATES:

NOW COMES the State of Texas in opposition to  
Petitioner's Application for Writ of Certiorari and  
states:

**OPINION BELOW**

The Opinion of the Court of Criminal Appeals of  
Texas is reported at 387 S.W. 2d 411.

**JURISDICTION**

Petitioner seeks to invoke the jurisdiction of this  
Court under Title 28, U.S.C. 1257, Section 3. Respond-  
ent respectfully submits that no substantial federal  
question is presented for review by the Supreme Court  
of the United States.

## **QUESTION PRESENTED**

Has Petitioner been denied due process of law and equal protection of the law under the Fourteenth Amendment of the Constitution of the United States of America as a result of the reading to the jury of Petitioner's prior conviction under Article 62, Vernon's Annotated Penal Code of Texas, for purposes of enhancement?

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

These are reproduced in Petitioner's Brief.

## **STATEMENT OF FACTS**

Petitioner's Statement of Facts is substantially correct with the exception that the court in its charge instructed the jury not to consider Petitioners' prior convictions in passing upon the issue of guilt.

## **ARGUMENT AND AUTHORITIES**

### **I**

The Texas habitual offender procedures in effect at the time of Petitioner's trial do not offend due process.

Petitioner was not denied due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States because the indictment under which he was charged alleged a prior conviction and was read to the jury and proof of the prior conviction was made before the jury following the submission of proof of the principal offense. In support of this contention, Petitioner relies on *Lane*

*v. Warden, Maryland Penitentiary*, 320 F. 2d 179 (4th Cir. 1963).

The United States Court of Appeals for the Fifth Circuit undertook the determination of this question in the instant case in *Breen v. Beto*, 341 F. 2d 96 (5th Cir. 1965), which was decided on January 28, 1965. In that opinion, the Court disposes of *Lane v. Warden*, *supra*, with the following statement at page 97:

"In support of his contention, appellant cites and strongly relies on *Lane v. Warden*, 320 F(2) 179 (4th Cir. 1963). This court has never so held, and under the controlling Texas Statutes and the authorities we are not disposed to adopt or follow the cited opinion. On the contrary, we are of the firm view that that case was not well decided and that the correct view of the law is otherwise."

The Court of Appeals for the Fifth Circuit has also considered this matter in the cases of *Reed v. Beto*, 343 F. 2d 723; *Taylor v. Beto*, 346 F. 2d 157; and *Reyes v. Beto*, 345 F. 2d 722. The same contention was presented to the Supreme Court of the United States in the case of *Wendell Odell Stephens v. Beto*, 377 S.W. 2d 139 (1964), by way of application for writ of certiorari. This Court denied certiorari in 1965, 350 U.S. 980, 85 S. Ct. 1344, April 26, 1965.

By way of further discussion of *Lane v. Warden*, *supra*, Respondent submits the following.

In *Lane*, the Court of Appeals for the Fourth Circuit considered a conviction in a court of Maryland. The defendant was charged by indictment for selling narcotics and in the indictment two prior convictions were alleged for the purpose of enhancing punishment (actually there were three indictments, each charging



a principal offense together with two prior convictions). The defendant objected to the reading of the indictments because they contained the prior convictions, but his objection was overruled. The Court of Appeals held that the reading of the indictments with their allegations of prior convictions denied the defendant a fair trial because the fairness of the jury was impaired by the knowledge of the defendant's prior criminal history.

Respondent disputes the applicability of *Lane v. Warden*, supra, urging that the facts of *Lane* are not analogous to the present case and also that the philosophy underlying the *Lane* decision is illogical and erroneous.

The *Lane* opinion at page 186 puts special emphasis on the proposition that the prejudice resulting from the reading of the two prior convictions to the jury could have been avoided by the State's following alternative Maryland procedures. No alternative methods of proving prior convictions are available under Texas practice.

Second, the defendant in *Lane* was charged under three indictments, each alleging the crime in issue, plus two prior convictions. Only one indictment is involved in the present case.

However, regardless of the facts and circumstances which distinguish *LANE V. WARDEN* from the case before this Court, Respondent strongly urges that the reasoning in *LANE V. WARDEN* is specious and should not be followed.

*Wolfe v. Nash*, 313 F. 2d 393 (8th Cir. 1963) cert. den. 376 U.S. 933, 84 S. Ct. 705 (Feb. 24, 1964) is

directly contra to *Lane v. Warden*. In *Wolfe v. Nash*, the evidence of prior felony convictions of the defendant was offered in the presence of the jury and it was argued by the defendant that a fair trial was denied. The Court disposed of this proposition, saying at page 401:

"... How and in what way proof of prior convictions shall be made under the State Habitual Criminal statute and what effect a deviation from the requirements of the statute would have, we regard as purely a local legal problem and of no national concern whatever. The due process clause of the Fourteenth Amendment does not enable us to review errors of state law."

The Texas decisions have uniformly upheld the constitutionality of its habitual offender enhancement statutes. *Mackie v. State*, 367 S. W. 2d 697 (1963).

Not only is *Lane v. Warden* an innovation in criminal and constitutional law, its holding being in direct conflict to *Wolfe v. Nash*, the Fifth Circuit decisions, the Texas authorities, and innumerable other state decisions which have construed habitual offender acts, but *Lane* relies in part on authority that is apparently completely contradictory to the holding. At page 181 of the *Lane* opinion, the Court cites *Michelson v. United States*, 335 U.S. 469 (1948), and quotes at length from this opinion, sought to be distinguished by Respondent. The Court in *Lane* did observe in footnote number 4 at page 182 that the *Michelson* decision had some language which did not accord with the decision in *Lane*. *Lane* was referring to page 475 in *Michelson* where the Court observes:

"The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts

might logically be persuasive that he is by propensity a probable perpetrator of the crime."

*Michelson* then states in a footnote appended to this quotation that:

"This (rule) would be subject to some qualifications, as when a prior crime is an element of the later offense; for example, *at a trial for being an habitual criminal*. There are well-established exceptions where evidence as to other transactions or a course of fraudulent conduct is admitted to establish fraudulent interest as an element of the crime charged." (Emphasis added)

It is difficult to perceive how the *Lane* opinion could cite the *Michelson* case and then purport to distinguish it logically.

*Michelson* not only clearly suggests that the Supreme Court of the United States approves of the practice in habitual offender cases of informing the jury of prior convictions and offering proof thereof, but *Michelson* also points to the long and firmly entrenched rule that other, extraneous crimes, may be shown to establish intent. Along with intent, proof of extraneous crimes have been permitted to show identity, motive and plan or design. Proof before the jury of crimes committed by the defendant other than those charged in the indictment has been approved by this Court in *Roe v. United States*, 316 F. 2d 617 (5th Cir. 1963), and *Huff v. United States*, 273 F. 2d 56 (5th Cir. 1959).

*Lane v. Warden* also points out another area where the jury can properly be apprised of crimes which the defendant has committed other than the crime charged. This is where the defendant puts his character in issue through the use of character witnesses or by himself

taking the stand and so permitting interrogation as to previous convictions.

The *Lane* theory that informing the jury of prior crimes must necessarily destroy the impartiality of the jury, is further refuted by the procedures authorized in Rules 8 and 13 of the Federal Rules of Criminal Procedure.

Rule 8 permits the joinder of two or more offenses in the same indictment as well as the joinder of defendants. Rule 13 authorizes the Court to order the consolidation of two or more indictments in a joint trial. Under the authority of these rules, promulgated by the Supreme Court of the United States, an information charging 225 separate and distinct crimes was upheld in *United States v. Taylor*, 207 F. 2d 437 (2nd Cir. 1953). In *Brandenburg v. Steele*, 177 F. 2d 279 (8th Cir. 1949), the defendant was indicted for 11 separate offenses of unlawful sales of narcotic drugs. In discussing Rules 8(a) and 13 and their predecessor statute, the Court observed:

"... In view of the statute and the Rules prescribed by the Supreme Court above referred to, which authorized the procedure which resulted in the appellant's conviction, it is obvious that he is entirely mistaken in his assertion about denial of due process. He was dealt with in accordance with long established and conventional federal procedure."

Under the philosophy of *Lane v. Warden*, the federal procedure in charging separate offenses in one indictment and the consolidation of indictments should be struck down and declared violative of the constitutional guarantee to a fair and impartial trial. Surely



the impact upon the jury which *Lane* worries about (the reading of an indictment charging two previous convictions) is greater and more destructive to impartiality when an information charging 225 separate offenses is read or when an indictment charging 11, distinct, unlawful sales of narcotics is read. Nevertheless, the federal practice of using multiple-count indictments and the consolidation of indictments finds continued sanction in federal decisions. See *United States v. Rabin*, 316 F. 2d 564 (7th Cir. 1963); *Finnegan v. United States*, 204 F. 2d 105 (8th Cir. 1953) cert. den. 346 U.S. 821, reh. den. 346 U.S. 880; *United States v. Pullings*, 321 F. 2d 287 (7th Cir. 1963); *Williams v. United States*, 317 F. 2d 545 (C.A.D.C. 1963). See also *Gore v. United States*, 244 F. 2d 763 (C.A.D.C. 1957) affirmed 357 U.S. 386.

This Court has recently considered charges involving a multi-count information in *Mishkin v. New York*, — U.S. —, 34 L.W. 4250 (1966), and *Ginzburg v. United States*, — U.S. —, 34 L.W. 4255 (1966). In *Mishkin* this Court considered a New York information charging 159 counts of obscenity. The defendant was convicted on 141 counts, and this Court affirmed the convictions without consideration or concern for the possible inherent prejudice that would accrue to a defendant charged under such an information.

In *Ginzburg*, a conviction under a Federal indictment charging 28 separate offenses of the federal obscenity statute was reviewed. Again this Court upheld the conviction without discussing possible prejudice that could arise under a multi-count indictment.



Respondent does not quarrel with the general rule that evidence showing the accused has committed a crime or crimes independent of the crime charged is inadmissible. The basis of this tenet is that the tendency of such evidence to prejudice the jury outweighs the probative evidentiary value in the usual case. However, the rule is not a constitutional right, but rather is a rule of evidence. *Baltimore Radio Show v. State*, 67 A. 2d 497, 510, reversed on other grounds. The limitation on the admission of evidence of other crimes is subject to a number of exceptions, as have been noted above, the exceptions being founded on considerations of justice and wisdom just as is the exclusionary rule itself. *Gianotos v. United States*, 104 F. 2d 929 (8th Cir. 1939); *Braggs v. United States*, 176 F. 2d 317, 321 (10th Cir. 1949) cert. den. 338 U.S. 861. In the case of habitual offenders, the purpose of the statutes is to protect society from a person or from criminals who persist in the commission of crime and by serving as a warning to first offenders. *Gore v. United States*, supra. These considerations override, and logically so, the rule forbidding the introduction of and proof of other crimes.

Respondent submits that the Texas practice of handling habitual offenders (in effect at the time of Petitioner's trial) in no way denies to defendants a fair and impartial trial under all principals, standards and doctrines of the law (except *Lane v. Warden*). Respondent does not say that there could not be a better method of proving prior crimes for the purpose of enhancing punishment or a method that is more favorable to the defendant (and indeed, Texas has recently amended its recidivist statutes), but Respond-

ent does maintain that the former Texas procedure in no way contravenes any of the protections or rights guaranteed by the United States Constitution.

It should be noted that the holding in *Lane v. Warden* is not to be given retrospective application under the holding in *Henderson v. Warden*, 248 F. Supp. 917, 1965 (4th Circuit).

Petitioner also seems to rely upon the case of *United States v. Banmiller*, 310 F. 2d 720 (3rd Cir. 1962) cert. den. 374 U.S. 828, 83 S. Ct. 1866. Respondent likewise submits that this case is not in point and should be overruled. The decision relies solely upon the reason contained in *Betts v. Brady*, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), expressly overruled by this Court in *Gideon v. Wainwright*, 372 U.S. 335, abolishing the distinction for all purposes between capital and non-capital prosecutions insofar as the Fourteenth Amendment to the Constitution of the United States of America is concerned.

## II.

**Should this Court hold the Texas habitual offender statutes violative of due process, the decision should not be retroactively applied.**

Respondent strongly suggests that this Court determine that the recidivist statutes of Texas do not violate due process. However, should the Court determine otherwise, Respondent urges that any decision vitiating the recidivist procedures of Texas be given only prospective application.

This Court, in recent decisions, has abandoned the

Blackstonian theory of judicial decisions which held that courts were discoverers and interpreters of the law rather than creators. Now it is conceded that the Court makes and creates new law. In these recent decisions, this Court has also become increasingly sensitive to the impact which newly defined constitutional rights have on the administration of state criminal laws and has restricted the applicability of these rights. See *Linkletter v. Walker*, 381 U.S. 618 (1965); *Tehan v. Shott*, 382 U.S. 406 (1966); *Johnson v. New Jersey*, — U.S. —, 34 L.W. 4592 (decided June 20, 1966).

The instant case, and others in which the Texas habitual offender procedures complained of here were involved, presents some of the considerations which the Supreme Court has thought important in limiting a ruling which announces a new constitutional principle for observance by state courts. Here, the State of Texas came to rely on its recidivist procedures by the refusal of the Supreme Court to consider and condemn the practice throughout the many years of the rule's application. Furthermore, the condemnation of the Texas procedure would unquestionably seriously disrupt the administration of our criminal jurisprudence by the mass release of many prisoners whose conviction was obtained in a trial where the punishment enhancement statutes were applied.

Respondent is suggesting an extension of the principles announced by *Linkletter*, *Tehan* and *Johnson v. New Jersey* that will permit a Federal Court to condemn a practice presented to it by habeas corpus proceedings or by certiorari, but provide by the decision that the ruling of the Court is not to apply to any case already tried including the case then before

it. In other words, if the Court feels that a certain practice is violative of due process and the decision creates a new constitutional right applicable to state prosecutions, then the Federal Courts should announce that the rule is applicable only to cases which are tried after the date of the decision but is not applicable to the case in which the decision was rendered or to any other case tried prior to the decision date.

Here Petitioner's conviction became final in 1962 when the judgment of the trial court was affirmed by the Texas Court of Criminal Appeals in *Reed v. State*, 353 S.W. 2d 850 (June 10, 1962), and the time for applying for certiorari from this Court expired. Any rule announcing a constitutional right that would destroy the recidivist practice in Texas in operation at that time should not, accordingly, be applied to the case now before the Court.

It should be observed that Texas has amended its habitual criminal procedure in its new Code of Criminal Procedure which became effective on January 1st of this year. Now the portions of the indictment charging prior offenses are not read to or proved before the jury until and unless the jury has returned a verdict of guilty with respect to the primary offense. See Articles 36.01 and 37.07, Texas Code of Criminal Procedure, 1966, copies of the pertinent portions being appended to this brief as Appendix "A." A state statute enacted since the commencement of litigation may bar a consideration of the Federal question presented even though the new statute is not applicable to the case under consideration. *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955).

Respondent does not mean to imply by the foregoing suggestions (that a new constitutional rule should be applied in a completely prospective manner) that it is felt that the old Texas recidivist practice offends the Constitution. Respondent again reiterates that such procedures in no way violate the Constitution and submits the prospective application theory as an alternative reason for upholding the conviction under consideration here.

### CONCLUSION

WHEREFORE, premises considered, Respondent prays the Court to affirm the holding of the Court of Criminal Appeals of Texas.

Respectfully submitted,

WAGGONER CARR

Attorney General of Texas

HAWTHORNE PHILLIPS

First Assistant Attorney General

T. B. WRIGHT

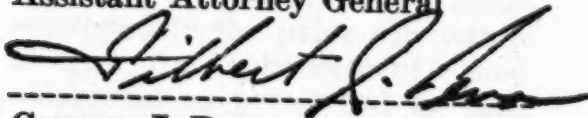
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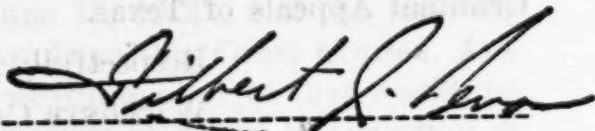
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## CERTIFICATE OF SERVICE

I am an Assistant Attorney General of the State of Texas and a member of the Bar of the Supreme Court of the United States, and do now enter my appearance in the Supreme Court of the United States in the above captioned cause, on behalf of the Respondent; I do further certify that a copy of the foregoing brief has been forwarded by United States Mail, First Class, Postage Prepaid, to Mr. Tom R. Scott, 1006 Midland National Bank Building, Midland, Texas 79701, Attorney for the Petitioner, this the ~~21<sup>st</sup>~~ day of September, 1966.



GILBERT J. PENA

Assistant Attorney General

## APPENDIX "A"

Article 36.01, Texas Code of Criminal Procedure, 1966:

"A jury being impaneled in any criminal action, the cause shall proceed in the following order:

"1. The indictment or information shall be read to the jury by the attorney prosecuting. When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07.

" . . . . "

Article 37.07, Texas Code of Criminal Procedure, 1966:

" . . . . "

"2. Alternate procedure.

" . . . . "

"(b) If a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense charged where the same is not absolutely fixed by law to some particular penalty except when the defendant, upon the return of a finding of guilty, requests that the punishment be assessed by the same jury. In the event the defendant elects to have the jury fix the punishment in cases where the punishment is fixed by law, the court shall instruct the jury that if they find the defendant is the same person who was convicted in the prior conviction or convictions alleged for enhancement, they should set his punishment as prescribed by law.

"Regardless of whether the punishment be assessed by the judge or the jury, evidence may be offered by the State and the defendant as to the prior criminal record of the defendant, his general reputation and his character.

" . . . . "

## INDEX

Interest of the State of North Carolina .....	1
Opinion Below .....	2
Jurisdiction .....	2
Question Presented .....	2
Statement of the Case .....	2
Constitutional and Statutory Provisions Involved .....	3
Summary of Argument .....	4
Argument .....	5
Conclusion .....	13

## TABLE OF CASES

Ashcraft v. Tennessee, 322 U. S. 143, 88 L. ed. 1192, 64 S. Ct. 921 .....	10
Baldwin v. Missouri, 281 U. S. 586, 74 L. ed. 1056, 1061, 50 S. Ct. 436, 72 ALR 1303 .....	10
Bell v. Texas, 387 S. W. 2d 411 .....	2
Bowman v. Lewis, 101 U. S. 22, 25 L. ed. 989 .....	10
Breen v. Beto, 341 F. 2d 96 .....	12
Buchalter v. New York, 319 U. S. 427, 87 L. ed. 1492, 63 S. Ct. 1129 .....	11
Chandler v. Warden Fretag, 348 U. S. 3, 99 L. ed. 4, 75 S. Ct. 1 .....	7
Estes v. Texas, 381 U. S. 532, 14 L. ed. 2d 543, 85 S. Ct. 1628 .....	11
Graham v. West Virginia, 224 U. S. 616, 56 L. ed. 917, 32 S. Ct. 583 .....	6, 7
Lane v. Warden, Maryland Penitentiary, 320 F. 2d 179 .....	8, 12
McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 S. Ct. 389 .....	6
Maxwell v. Dow, 176 U. S. 581, 593, 44 L. ed. 597 .....	10
Michelson v. United States, 335 U. S. 469, 93 L. ed. 168, 69 S. Ct. 218 .....	8
Moore v. Missouri, 159 U. S. 673, 40 L. ed. 301, 16 S. Ct. 179 .....	6

Oyler v. Boles, Warden, 368 U. S. 448, 7 L. ed. 2d 446, 82 S. Ct. 501 .....	6, 7
Palko v. Connecticut, 302 U. S. 319, 82 L. ed. 238, 58 S. Ct. 149 .....	9
Reed v. Beto, 343 F. 2d 723 .....	12
Reyes v. Beto, 345 F. 2d 722 .....	12
Shepherd v. Florida, 341 U. S. 50, 95 L. ed. 740, 71 S. Ct. 549 .....	11
Snyder v. Massachusetts, 291 U. S. 97, 114, 78 L. ed. 674, 682, 54 S. Ct. 330, 90 ALR 575 .....	9, 11
Spencer v. Texas, No. 967, Oct. Term, 1965 .....	12
State v. Cole, 241 N. C. 576, 86 S. E. 2d 202 .....	6
State v. Davidson, 124 N. C. 839, 32 S. E. 957 .....	6
State v. Lawrence, 264 N. C. 220, 141 S. E. 2d 264 .....	6
State v. Miller, 237 N. C. 427, 75 S. E. 2d 242 .....	6
State v. Powell, 254 N. C. 231, 118 S. E. 2d 617 .....	5, 6
State v. Stone, 245 N. C. 42, 44, 95 S. E. 2d 77 .....	5, 6
Stephens v. Beto, 377 S. W. 2d 139, cert. den ____ U. S. ____, 85 S. Ct. 1344 .....	12
Taylor v. Beto, 346 F. 2d 157 .....	12
Williams v. New York, 337 U. S. 441 .....	7
Wolfe v. Nash, 313 F. 2d 393 .....	12

## STATUTES

General Statutes of North Carolina 15-147 .....	3
General Statutes of North Carolina 18-28 .....	3
General Statutes of North Carolina 90-111 .....	4
28 USC 1257(3) .....	2

## MISC.

Rule 42, Paragraphs 4 and 5, Revised Rules of the Supreme Court of the United States .....	1
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# **Supreme Court of the United States**

**October Term, 1966**

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**No. 69**

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**ROBERT A. BELL, JR.,**

**Petitioner,**

**vs.**

**THE STATE OF TEXAS,**

**Respondent.**

---

**ON WRIT OF CERTIORARI TO THE COURT OF  
CRIMINAL APPEALS OF TEXAS**

---

**BRIEF OF THE ATTORNEY GENERAL OF NORTH  
CAROLINA AMICUS CURIAE**

---

## **INTEREST OF THE STATE OF NORTH CAROLINA**

The State of North Carolina, through its Attorney General, files this brief as amicus curiae pursuant to the provisions of Rule 42, Paragraphs 4 and 5, of the Revised Rules of the Supreme Court of the United States.

The primary issue in the principal case before the Court is whether or not Petitioner was denied due process of law and equal protection of the law under the Fourteenth Amendment of the Constitution of the United States as the result of the reading to the jury a bill of indictment containing charges as to the offense for which Petitioner was then on trial and also allegations, or charges, of a prior offense committed by Petitioner for which Petitioner was convicted for purposes of enhancing Petitioner's punishment. The State of North Carolina is highly interested in any decision



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that may result from the presentation of this issue since the State of North Carolina has several statutes which increase the punishment upon prosecution for a second or subsequent offense if the prisoner is convicted of such second or subsequent offense.

Under North Carolina procedure and by statute the prior offense is alleged in the bill of indictment for the subsequent offense, such allegations as to the prior offense being governed by a procedural statute, and all issues as to the subsequent offense and prior offense are tried together and the jury is required to find the existence of a prior offense, if any, the prior record and identity of the prisoner.

Should the position of the Petitioner prevail in this case, then the procedural statute and decisions of the Supreme Court of North Carolina on this subject would be nullified.

### **OPINION BELOW**

The Opinion of the Court of Criminal Appeals of Texas is reported at 387 S. W. 2d 411.

### **JURISDICTION**

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC 1257(3).

### **QUESTION PRESENTED**

Is it a violation of the Due Process and Equal Protection Clause of the Fourteenth Amendment to read or make known to the jury the Petitioner's prior conviction and to introduce evidence as to Petitioner's prior conviction upon the trial of a subsequent offense for the purpose of increasing or enhancing punishment?

### **STATEMENT OF THE CASE**

We do not state facts in regard to the case as there seems

to be no dispute as to the statement of facts made by the Petitioner in his brief.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As to the State of North Carolina, there are involved certain statutes, as follows:

"Sec. 15-147. *Former conviction alleged in bill for second offense.*—In any indictment for an offense which, on the second conviction thereof, is punished with other or greater punishment than on the first conviction, it is sufficient to state that the offender was, at a certain time and place, convicted thereof, without otherwise describing the previous offense; and a transcript of the record of the first conviction, duly certified, shall upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction."

We also give below certain examples of statutes of the State of North Carolina wherein the punishment is increased for a second or subsequent offense. All section references are to the General Statutes of North Carolina, together with Cumulative Supplements:

"Sec. 18-28. *Distilling or manufacturing liquor; first offense misdemeanor.*—It is unlawful for any person to distill, manufacture, or in any manner make, or for any person to aid, or abet any such person in distilling, manufacturing, or in any manner making any spirituous or malt liquors or intoxicating bitters within the State of North Carolina. Any person or persons violating the provisions of this section shall, for the first conviction, be guilty of a misdemeanor and, upon conviction or confession of guilt, punished in the discretion of the court; for the second or any subsequent conviction, said person or persons shall be guilty of a felony, and upon conviction or confession in open court shall be imprisoned in the State Prison for not less than four months and not exceeding five years, in the discretion of the court."

Another example is the Penalty Statute for a violation of the Narcotic Drug Act of North Carolina, and a portion of this Penalty Statute is as follows:

"Sec. 90-111. *Penalties for violation.* — (a) Any person violating any provision of this article or any person who conspires, aids, abets, or procures others to do such acts shall upon conviction be punished, for the first offense, by a fine of not more than one thousand dollars (\$1,000.00) or be imprisoned in the penitentiary for not more than five years, or both, in the discretion of the court. For a second violation of this article, or where in case of a first conviction of violation of this article, the defendant shall previously have been convicted of a violation of any law of the United States, or of this or any other State, territory, or district, relating to the sale or use or possession of narcotic drugs or Marijauna, and such violation would have been punishable in this State if the offending act had been committed in this State, the defendant shall be fined not more than two thousand dollars (\$2,000.00) and be imprisoned not less than five nor more than ten years. For a third or subsequent violation of this article, or where the defendant shall previously have been convicted two or more times in the aggregate of a violation of any law of the United States, or of this or any other State, territory, or district relating to the sale, use or possession of narcotic drugs or Marijauna, and such violation would have been punishable in this State, the defendant shall be fined not more than three thousand dollars (\$3,000.00) and be imprisoned in the penitentiary not less than fifteen (15) years nor more than life imprisonment."

The remaining subsections of this section relate to suspended sentences and probation and also for an increased offense for selling or furnishing such drugs to a minor.

We do not quote the provisions of the Fourteenth Amendment or of the Sixth Amendment as they are set forth in Petitioner's brief.

It is customary in North Carolina for the prosecuting officer to notify the prisoner as to the charges against him by reading the bill of indictment and demanding that the prisoner plead to the indictment.

#### **SUMMARY OF ARGUMENT**

The State of North Carolina will argue that the procedure as to pleading or proving a second or subsequent offense

does not violate the constitutional rights of a person on trial for such second or subsequent offense.

The State of North Carolina will further argue that such procedure does not result in an unfair or prejudicial trial.

### ARGUMENT

IT IS CONSTITUTIONAL FOR THE STATE TO ALLEGE IN THE BILL OF INDICTMENT FOR A SECOND OR SUBSEQUENT OFFENSE THE FACT OF A PRIOR OFFENSE AND CONVICTION, AND TO INTRODUCE EVIDENCE AS TO SUCH PRIOR CONVICTION UPON TRIAL OF THE SECOND OR SUBSEQUENT OFFENSE.

So far as the State of North Carolina is concerned we have heretofore quoted the procedural statute which requires the allegations as to the prior conviction to be set forth in the bill of indictment for the subsequent offense. Our decisions show that both issues are tried in the trial for the second or subsequent offense. The Case of *STATE v. POWELL*, 254 N. C. 231, 118 S. E. 2d 617, is an example of this practice. In the *Powell* Case the Supreme Court of North Carolina said:

"Where a person is charged in a bill of indictment or warrant with an offense which, on the second conviction thereof, is punishable with a greater penalty than on the first conviction, and the indictment or warrant alleges a prior conviction, 'a transcript of the record of the first conviction, duly verified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction.' G. S. 15-147. *STATE v. STONE*, 245 N. C. 42, 44, 95 S. E. 2d 77. The verdict of the jury 'should spell out, first, whether the jury find the defendant guilty of the violation of G. S. 14-138 charged in the warrant or indictment, and if so, whether they further find that he was convicted of' the alleged prior violation thereof. *STATE v. STONE*, supra. While it is



not required, it would not be amiss to submit to the jury written issues. \* \* \*

In the Case of *STATE v. LAWRENCE*, 264 N. C. 220, 141 S. E. 2d 264, commenting on this practice the Supreme Court of North Carolina said:

"The accused may be convicted of the specific offense charged, or he may be convicted as in case of a second offense. The verdict must spell out (1) whether defendant is guilty of the specific violation charged and, if so, (2) whether he was convicted of a prior violation of such offense charged. *STATE v. POWELL*, supra; *STATE v. COLE*, 241 N. C. 576, 86 S. E. 2d 203. In other words, the accused may, on a charge such as that preferred against petitioner, be convicted or plead guilty to the specific violation charged—a misdemeanor—or he may be convicted or plead guilty as in case of a second offense—a felony. Punishment is in accordance with the conviction or plea. \* \* \*

For the North Carolina rule, see also: *STATE v. MILLER*, 237 N. C. 427, 75 S. E. 2d 242; *STATE v. STONE*, 245 N. C. 42, 95 S. E. 2d 77; *STATE v. DAVIDSON*, 124 N. C. 839, 32 S. E. 957; *STATE v. COLE*, 241 N. C. 576, 86 S. E. 2d 203.

This Court has approved and has generally upheld the validity of habitual criminal acts and other forms of criminal recidivist legislation, and, as we understand the matter, no constitutional attack is made upon such acts as being generally invalid, and indeed no such attack could be made for this Court had declared such acts to be constitutional (*MOORE v. MISSOURI*, 159 U. S. 673, 40 L. ed. 301, 16 S. Ct. 179; *McDONALD v. MASSACHUSETTS*, 180 U. S. 311, 45 L. ed. 542, 21 S. Ct. 389; *GRAHAM v. WEST VIRGINIA*, 224 U. S. 616, 56 L. ed. 917, 32 S. Ct. 583; *OYLER v. BOLES, WARDEN*, 368 U. S. 448, 7 L. ed. 2d 446, 82 S. Ct. 501).

We feel that this Court has also expressed its opinion upon the method or procedure as to how the prior offense may be

proved or established; that is, whether it should be done in an independent proceeding or in the same proceeding in which the subsequent offense is tried. For example: In *CHANDLER v. WARDEN FRETAG*, 348 U. S. 3, 99 L. ed. 4, 75 S. Ct. 1, in commenting upon this particular issue Mr. Chief Justice Warren, writing for the Court, said:

"In short, even though the act does not create a separate offense, its applicability to any defendant charged with being an habitual criminal must be determined by a jury in a judicial hearing. Compare *WILLIAMS v. NEW YORK*, 337 U. S. 441. That hearing and the trial on the felony charge, *although they may be conducted in a single proceeding*, are essentially independent of each other." (Emphasis ours)

In the Case of *OYLER v. BOLES*, *supra*, this Court said:

"Even though an habitual criminal charge does not state a separate offense, the determination of whether one is an habitual criminal is 'essentially independent' of the determination of guilt on the underlying substantive offense. *CHANDLER v. FRETAG*, 348 U. S. 3, 8, (1954). Thus, although the habitual criminal issue may be combined with the trial of the felony charge, 'it is a distinct issue, and it may be appropriately the subject of separate determination.' "

In *GRAHAM v. WEST VIRGINIA*, *supra*, this Court said:

"It cannot be said that the prisoner was deprived of due process of law because the question as to former conviction was passed upon separately. While it is familiar practice to set forth in the indictment the fact of prior conviction of another offense, and to submit to the jury the evidence upon that issue, together with that relating to the commission of the crime which the indictment charges, still in its nature it is a distinct issue, and may appropriately be the subject of separate determination."

A canvass of the highest appellate courts of the States will

show that more than one-half follow the rule of determining the issue as to the prior offense at the same time as the trial of the subsequent offense, and while the issue as to the prior offense is said to be an independent or separate issue, nevertheless, over the years no constitutional fault has been found with this procedure. The fact that some states are beginning to revise their codes and provide for the issue of the prior offense to be heard after a conviction on trial of the subsequent offense this does not mean that the previous procedure was unconstitutional; it only means that there has been a change in some states as to their legislative concepts on the subject. While a mere mathematical enumeration does not prove or disprove the issue of constitutionality, yet it is hard to believe that over the decades a majority of the courts have been wrong about the matter, and we are just now at this late date discovering the error. This is especially true since this Court has approved the trial of both issues in one proceeding as an acceptable method.

The only exception, so far as the Federal Courts are concerned, appears to be the Case of *LANE v. WARDEN, MARYLAND PENITENTIARY*, 320 F. 2d 179 (4th Cir. 1963). A reading of the opinion in *LANE v. WARDEN*, supra, shows that the Court greatly relied upon the fundamental rule that evidence of prior crimes is inadmissible at a criminal trial either to establish guilt or to show that a defendant would be likely to commit the crime with which he is charged. Of course, as everyone knows, this rule is much more honored by the exceptions which are many. The Court ignores the proposition that other independent offenses have long been admitted or shown in evidence to show knowledge, intent and motive; to show plan or design, to prove identity, or, in cases where two offenses are so closely connected, that neither can be adequately proved without proving the other. One of the oldest forms of this exception is the well-known case where an attempt is made to bribe a juror and which independent crime can be shown by way of admission of guilt.

The Case of *MICHELSON v. UNITED STATES*, 335 U. S.

469, 93 L. ed. 168, 69 S. Ct. 218, certainly does not support the rule contended for in Lane. If it is said that reading the bill of indictment to the jury which contains an allegation of a prior offense is highly prejudicial to the defendant, then by the same token the reading of the bill of indictment as to the primary or subsequent offense is prejudicial to the defendant as well as reading many bills of indictment where the defendant is indicted for multiple offenses or a bill of indictment which contains many separate counts. This can be no more prejudicial than the position of the defendant who feels impelled to become a witness in his own behalf and is forced to admit previous crimes.

The Petitioner apparently thinks that because an unfair trial has been shown under the circumstances set forth in *Michelson* it follows as a conclusive presumption that an unfair trial was had in his case. He disregards the fact that the legislatures of the States in enacting habitual criminal laws or laws giving increased punishment for subsequent offenses have made his criminal record a part of his case although decided as an independent issue. Here we should bear in mind what Mr. Justice Cardozo said (*PALKO v. CONNECTICUT*, 302 U. S. 319, 82 L. ed. 288, 58 S. Ct. 149):

"The tyranny of labels (*SNYDER v. MASSACHUSETTS*, 291 U. S. 97, 114, 78 L. ed. 674, 682, 54 S. Ct. 330, 90 ALR 575) must not lead us to leap to a conclusion that a word which in one set of facts may stand for an oppression or enormity is of like effect in every other."

And in *SNYDER*, *supra*, this same Justice said:

"A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rules to existence."

We think the concept expressed by Mr. Justice Jackson in the Case of *ASHCRAFT v. TENNESSEE*, 322 U. S. 143, 88 L. ed. 1192, 64 S. Ct. 921, is still today a sound concept. He said:

"The burden of protecting society from most crimes against persons and property falls upon the state. Different states have different crime problems and some freedom to vary procedures according to their own ideas.

\*\*\* The use of the due process clause to disable the states in protection of society from crime is quite as dangerous and delicate a use of federal judicial power as to use it to disable them from social or economic experimentation. The warning words of Mr. Justice Holmes in his dissenting opinion in *BALDWIN v. MISSOURI*, 281 U. S. 586, 595, 74 L. ed. 1056, 1061, 50 S. Ct. 436, 72 ALR 1303, seem to us appropriate for rereading now."

In *BOWMAN v. LEWIS*, 161 U. S. 22, 25 L. ed. 989, Mr. Justice Bradley said:

"The 14th Amendment does not profess to secure all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceedings."

In *MAXWELL v. DOW*, 176 U. S. 581, 593, 44 L. ed. 597, this Court said:

"\* \* \* The people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their Constitution and legislation for the manner in which criminal and civil actions shall be tried, it is in entire conformity with the character of the federal government that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials."



Again in *SNYDER v. MASSACHUSETTS*, supra, Mr. Justice Cardozo said:

"The Constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the people of that Commonwealth expresses itself in law. *We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness.* Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, \* \* \*." (Emphasis ours)

Again in *SNYDER v. MASSACHUSETTS*, supra, the words of Mr. Justice Cordoza are very appropriate when he said:

"Due process of law requires that the proceeding shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. 'The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall.' \* \* \* What is fair in one set of circumstances may be an act of tyranny in others."

The cases resulting in unfair trials because of prejudicial newspaper accounts or the televising of a state criminal trial (*ESTES v. TEXAS*, 381 U. S. 532, 14 L. ed. 2d 543, 85 S. Ct. 1628; *SHEPHERD v. FLORIDA*, 341 U. S. 50, 95 L. ed. 740, 71 S. Ct. 549) are not in point. In such cases the trial was infected with unfairness because of acts and operations that came in from the outside and in some instances neither the prisoner nor the State had any control over the situation. It is not enough to say that because a criminal's previous conviction is made a part of the subsequent offense as to punishment that the trial is automatically infected with unfairness. The rule expressed by this Court in *BUCHALTER v. NEW YORK*, 319 U. S. 427, 87 L. ed. 1492, 63 S. Ct. 1129, is applic-

able, and the rule expressed by this Court is as follows:

"As we have recently said, 'It is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'"

We believe, therefore, that the decisions of the Fifth Circuit and the Eighth Circuit are much more apposite to this situation. The language of the Court in *BREEN v. BETO*, 341 F. 2d 96, (5th Cir. 1965) is much more in accord with the previous concepts of this Court as to the proper functions of the Fourteenth Amendment, when it said:

"In support of his contention, appellant cites and strongly relies on *LANE v. WARDEN*, 320 F. 2d 179 (4th Cir. 1963). This Court has never so held, and under the controlling Texas statutes and the authorities we are not disposed to adopt or follow the cited opinion. On the contrary, we are of the firm view that the case was not well decided and that the correct view of the law is otherwise."

To the same effect, *REED v. BETO*, 343 F. 2d 723; *TAYLOR v. BETO*, 346 F. 2d 157; *REYES v. BETO*, 345 F. 2d 722; *WENDELL O'DELL STEPHENS v. BETO*, 377 S.W. 2d 139, cert. den. \_\_\_\_ U. S. \_\_\_\_, 85 S. Ct. 1344.

In *WOLFE v. NASH*, 313 F. 2d 393, the Eighth Circuit expressed itself in accord with the previous concepts of this Court when it said:

"How and in what way proof of prior convictions shall be made under the State habitual criminal statute, and what effect a deviation from the requirements of the statute would have, we regard as purely a local legal problem and of no national concern whatever."

**CONCLUSION**

We ask that this brief be considered also in connection with **SPENCER v. TEXAS**, No 967, October Term, 1965, which is now pending before this Court and which raises the same questions as are now raised in the Bell Case (No. 69). North Carolina, therefore, asks that its procedure shall remain in force and not be disturbed. The criminals of the underworld are not stupid, and they quickly become aware of the facts that repeated acts of crime can bring more severe punishment. When a State legislature says that a prior conviction can bring about increase of punishment and a State supreme court holds that the issue as to the prior conviction can be tried at the same time as the trial of the subsequent offense, then why should the criminal be protected as to his criminal record? We suggest that the protection of law abiding citizens who go about their daily lives should weigh more heavily than the protection of the criminal.

Respectfully submitted,

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**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1906**

**No. 69**

**ROBERT A. BULL, JR.,**

*Petitioner,*

**v.**

**THE STATE OF TEXAS,**

*Respondent.*

**BRIEF FOR THE PETITIONER**

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# INDEX

## SUBJECT INDEX

	Page
<b>REPLY BRIEF FOR THE PETITIONER</b>	
I There Was No Necessity for Injecting Allegations of Petitioner's Prior Criminality Into the Trial on the Merits of the Primary Count .....	1
II Setting Out Multiple Offenses in a Single Indictment Is Not the Equivalent of Alleging Prior Convictions .....	3
III The Rule Excluding Evidence of Prior Convictions Is Fundamental and Essential to Due Process .....	4
IV The Procedure Here in Issue Permits the Evidence of Prior Convictions to Be Admitted for Reasons Which Are Irrelevant to the Question of Present Guilt .....	6
V A Holding of This Court That the Procedure Here in Issue Is Unconstitutional Should Be Given Present Application .....	7
CONCLUSION .....	9

## TABLE OF AUTHORITIES CITED

### CASES:

<i>Brown v. Allen</i> , 344 U.S. 443, 489 (1953) .....	8
<i>Elgin, J., &amp; E. Ry. Co. v. Gibson</i> , 355 U.S. 897 (1957) .....	8
<i>England v. Louisiana State Bd. of Medical Examiners</i> , 375 U.S. 411 (1964) .....	7
<i>Estes v. Texas</i> , 381 U.S. 532 (1965) .....	5
<i>Griffin v. California</i> , 380 U.S. 609 (1965) .....	4
<i>Huron v. State</i> , 30 S.W.2d 326 (Tex. Crim. App., 1930) .....	4



	Page
<i>James v. United States</i> , 366 U.S. 213 (1961) .....	7
<i>Johnson v. New Jersey</i> , 383 U.S. —, 86 S.Ct. 1772 (1966) .....	7, 8
<i>Lane v. Warden, Maryland Penitentiary</i> , 320 F.2d 179 (4th Cir., 1963) .....	1, 2, 4, 5
<i>Linkletter v. Walker</i> , 381 U.S. 618 (1965) .....	7, 8
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961) .....	8
<i>Marshall v. United States</i> , 360 U.S. 310 (1959) ....	3
<i>Michelson v. United States</i> , 335 U.S. 469 (1948) ....	6, 7
<i>Miranda v. Arizona</i> , 383 U.S. —, 86 S.Ct. 1602 (1966) .....	8
<i>Oler v. State</i> , 378 S.W.2d 857 (Tex. Crim. App., 1964) .....	4
<i>Rideau v. Louisiana</i> , 373 U.S. 723 (1963) .....	5
<i>Seay v. State</i> , 395 S.W.2d 40 (Tex. Crim. App., 1965) .....	4
<i>Sheppard v. Maxwell</i> , 383 U.S. —, 86 S.Ct. 1507 (1966) .....	5
<i>Turner v. Louisiana</i> , 379 U.S. 466 (1965) .....	5

## STATUTES:

Act of 6 & 7 William IV, c. III (1836) .....	2
Tex. Code of Criminal Procedure, Article 36.01 ....	3
Tex. Code of Criminal Procedure, Article 37.07 ....	3, 5

## BOOKS:

KLAIVEN & ZEISEL, <i>The American Jury</i> , 127-130 (1966) .....	5
---	---

## MISCELLANEOUS:

Comment, Recidivist Procedures, 40 N.Y.U. L.Rev. 332 (1965) .....	7
State Bar of Texas, Commentaries on Revision of Code of Criminal Procedure (December 16, 1966) .....	5
43 Tex. L.Rev. 392 (1965) .....	7

**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1966**

**No. 69**

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**ROBERT A. BELL, JR.,**

*Petitioner,*

*vs.*

**THE STATE OF TEXAS,**

*Respondent.*

---

**REPLY BRIEF FOR THE PETITIONER**

**I.**

**There Was No Necessity for Injecting Allegations of Petitioner's Prior Criminality Into the Trial on the Merits of the Primary Count.**

In an effort to distinguish *Lane v. Warden, Maryland Penitentiary*, 320 F.2d 179 (4th Cir., 1963) the state makes the following contention:

The Lane opinion at page 186 puts special emphasis on the proposition that the prejudice resulting from the reading of the two prior convictions to the jury could have been avoided by the State's following alternative Maryland procedures. No alternative methods of proving prior convictions are available under Texas practice. (State's Brief, p. 4)

This statement was previously made in the state's brief in response to the application for writ of certiorari. As noted in our reply brief filed at that time, the quoted statement is incorrect. The Maryland practice at the time of the *Lane* trial is described by the court in that case as follows:

The problem of creating prejudice in the minds of the triers of fact by reading in open court the indictment containing allegations of prior criminal convictions of the accused is the same in the present case as it was in the *Ferrone* case. Even Maryland has now joined this group by the enactment of Maryland Rule of Procedure 713, effective January 1, 1962, *subsequent* to *Lane's* trial and convictions. 320 F.2d at 184. (Emphasis added.)

The relevant point in this case, as in *Lane*, is that adequate procedures *can* be readily provided, e.g., by withholding the reading of the enhancement count and withholding the proof of prior convictions until the jury has returned a verdict on the substantive phase of the case. These protective procedures are neither radical nor novel. See Act of 6 & 7 William IV, c. III, 1836. They do not lengthen the trial, but to the contrary, they lighten the work load of the court in that they obviate the necessity of inquiry into the prior offense if there is an acquittal on the principal offense.

The plea of necessity is continued in another vein at page 9 of the state's brief where it is urged that the necessity of punishing habitual criminals requires the procedure here in issue. The first fallacy in this argument is that it assumes the guilt of the defendant. The accused is not an

habitual criminal until he is convicted of the subsequent offense. He is entitled to a fair hearing on the issue of whether or not he is guilty of the principal offense. Moreover, the argument confuses the state's recidivist statutes, the validity of which are not an issue, with the procedures used to administer those statutes. The best rebuttal to this argument of necessity is Articles 36.01 and 37.07 of the new Texas Code of Criminal Procedure (State's Brief, p. 15). By the simple procedure provided in these statutes the rights of the accused are adequately protected without detriment to the state's recidivist statutes.

## II.

### **Setting Out Multiple Offenses in a Single Indictment Is Not the Equivalent of Alleging Prior Convictions.**

In an attempt to justify the procedure here in issue the state attempts to equate its procedure to the federal practice of permitting the consolidation of two or more indictments into a single trial. This argument erroneously equates the allegations of an indictment with the judgment of a court. The defendant is able to offer testimony on multiple indictment, but he is not allowed to go behind the prior conviction to relitigate the merits of the prior offense or to show extenuating circumstances. He can only stand mute on this issue while the state proves him to be a "convicted felon." We submit that juries give greater credence to the findings of courts than to the allegations of prosecutors and that they are more likely to regard prior convictions as evidence of present guilt than they are allegations which can be met with rebuttal evidence.

If the state wishes to look to the federal practice as a guide, it could follow *Marshall v. United States*, 360 U.S.

310 (1959) which held information as to prior convictions to be so prejudicial as to demand reversal.

### III.

#### **The Rule Excluding Evidence of Prior Convictions Is Fundamental and Essential to Due Process.**

The state admits that admitting evidence of a prior conviction has a "tendency" to prejudice the rights of the accused. However, they submit that this is a "rule of evidence" rather than a constitutional right (State's Brief, p. 9).

This may define the problem, but it does not answer it. Constitutional rights and rules of evidence are not mutually exclusive. *Griffin v. California*, 380 U.S. 609 (1965).

The Court of Criminal Appeals of Texas in *Seay v. State*, 395 S.W.2d 40 (1965) stated that evidence of prior convictions was "highly inflammatory and prejudicial to appellant and stripped him of a fair and impartial trial that he was entitled to receive". 395 S.W.2d at p. 45. In *Huron v. State*, 30 S.W.2d 326 (Tex. Crim. App., 1930) the court states that admitting testimony of an unrelated federal offense in a state prosecution "would necessarily be of much prejudice to the appellant in the eyes of the jury".

The Court of Criminal Appeals of Texas when first confronted with the decision in *Lane* stated that it was "certainly persuasive", *Oler v. State*, 378 S.W.2d 857 (1964), but declined to follow it because it lacked rule making powers.

In a comment upon the new Texas Code of Criminal Procedure the State Bar of Texas recognized the validity of



*Lane* with the following comment on Article 37.07 which corrects the procedure here in issue:

Another great stride toward a better administration of justice has been effected by this article (37.07). It insures an accused a trial on the issue of guilt free from bias or prejudice that may be brought against him because of his misdeeds in the past . . . See *Lane v. Warden*, 320 F.2d 179. State Bar of Texas, Commentaries on Revision of Code of Criminal Procedure (December 16, 1964).

These assumptions of the prejudicial effect of advising the jury of the defendant's record have been confirmed by researchers in the field of jury behavior. KLAVERN & ZEISEL, *The American Jury*, 127-130 (1966).

In *Estes v. Texas*, 381 U.S. 532 (1965), *Sheppard v. Maxwell*, 383 U.S. —, 86 S.Ct. 1507 (1966), *Turner v. Louisiana*, 379 U.S. 466 (1965) and *Rideau v. Louisiana*, 373 U.S. 723 (1963) this Court has jealously guarded the right of the accused to be secure from the injection of prejudicial influences into the trial from non-judicial sources. Here we have a judicial procedure which through its operation permits the prosecution to inject irrelevant and admittedly prejudicial material directly into the trial. To hold such a procedure valid would be a serious retreat from the prior holdings of this Court.

## IV.

**The Procedure Here in Issue Permits the Evidence of Prior Convictions to Be Admitted for Reasons Which Are Irrelevant to the Question of Present Guilt.**

At pages 6 and 7 of its brief, the state points out that if a defendant puts his character in issue through the use of a character witness or by taking the stand to testify, interrogation as to previous convictions is permitted. Presumably, we are to draw the conclusion that the procedure here in issue is but another well recognized exception to an exclusionary rule against admitting evidence of prior convictions. The procedure here in issue is distinguishable from exceptions to the exclusionary rule in that the exceptions all bear to some extent upon relevant inquiry into the guilt of the accused on the present offense. Thus, if the defendant testifies in his own behalf, he is attempting to prove his innocence of the present crime charged. Such testimony if not neutralized by the state, presumably leads the jury to a finding of innocence. Therefore, the state is given the opportunity to discredit and rebut such evidence by showing prior convictions. Similarly, if the defendant offers character testimony, the state is permitted to cross-examine these witnesses with regard to prior convictions. *Michelson v. United States*, 335 U.S. 469 (1948).

In the procedure in issue in this case the state is permitted to place in evidence prior convictions as part of its case in chief for a purpose which is irrelevant to the defendant's present guilt, to prove that he has a prior record for purposes of securing an enhanced penalty. The procedure here in issue is not even a stone in the "grotesque structure" of exceptions described by Justice Jackson in

*Michelson*. It is not supported by the exceptions to the exclusionary rule. Its eradication will not effect the balancing of policies reached in permitting the other exceptions. See, Comment, Recidivist Procedures, 40 N.Y.U. L.Rev. 332, 336 (1965); 43 Tex. L.Rev. 392 (1965).

## V.

### **A Holding of This Court That the Procedure Here in Issue Is Unconstitutional Should Be Given Present Application.**

The state urges that a holding that the procedure involved in this case is unconstitutional should not be given a retroactive application but should be applied in a *purely* prospective manner. (State's Brief, pp. 10-13.) The issue of retroactive application is not in this case and is presented to the Court in the case of *Reed v. Beto*, No. 70. We will leave the question of retroactivity to counsel in that case.

Without citation of authority or enumeration of policy considerations which demand such a ruling, the state asks that upon holding the procedure here in issue unconstitutional this Court refuse to apply the rule announced to this case, here on direct appeal, and limit its application in a purely prospective manner. This is urged as a "new constitutional rule". The rule suggested is neither new nor justified in this case. As discussed in *Linkletter v. Walker*, 381 U.S. 618, 621-622 (1965) and *Johnson v. New Jersey*, 383 U.S. —, 86 S.Ct. 1772, 1781 (1966) this Court in prior cases has applied new judicial standards in a wholly prospective manner. See, *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964); *James v. United States*, 366 U.S. 213 (1961). However, even

when prior decisions were being overruled this Court has not seen fit to apply its constitutional holdings on matters involving human rights in a purely prospective manner. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 383 U.S. —, 86 S.Ct. 1602 (1966).

Admitting that there is no prior holding of this Court on the question presented, the state claims that it came to rely on the procedure here in issue by this Court's refusal of certiorari in prior cases and prays that any rule announced in this case be applied purely prospectively. (State's Brief, p. 11.) This reliance upon refusal of certiorari was ill founded. *Elgin, J., & E. Ry. Co. v. Gibson*, 355 U.S. 897 (1957), *Brown v. Allen*, 344 U.S. 443, 489 (1953). The only reason for ever making a rule purely prospective is out of concern for vested rights or policy considerations. Clearly the State of Texas has no vested right in the confinement of the petitioner. Granting him a new trial will not involve any of the policy considerations discussed by the court in *Linkletter* or *Johnson*. It is unthinkable that the highest court of a nation which prizes human dignity, freedom and the value of the individual, will limit its decisions so as to deny a petitioner on direct appeal the fruits of the rule announced in this case. Such a holding would foreclose the utility of this Court to all but institutional litigants. While there may be some issues that can be trusted to protection by groups, organizations, and committees, we respectfully submit that the best hope of a free society is still the selfish desire of the individual to live in freedom with his rights intact. The individual's quest for justice should not be dulled by taking away the just fruit of successful litigation involving rights guaranteed by the highest law of the land.

**Conclusion**

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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NO. 69

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1966

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ROBERT A. BELL, JR.,

*Petitioner*

VS.

THE STATE OF TEXAS,

*Respondent*

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SUPPLEMENTAL BRIEF OF RESPONDENT

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## LIST OF AUTHORITIES

	Page
Chandler v. Fretag, 348 U.S. 3, 75 Sup. Ct. 1. ....	5
Fahy v. Connecticut, 375 U.S. 85, 84 Sup. Ct. 229 .....	11
Graham v. West Virginia, 224 U.S. 616, 32 Sup. Ct., 583, 56 L.Ed. 917 .....	2, 5
Hefferman v. United States (3d Cir.), 50 Fed. 2d, 554 ....	5
Linkletter v. Walker, 381 U.S. 618, 85 Sup. Ct. 1731, 14 L.Ed. 2d 601 .....	10
Massey v. United States, 281 Fed. 293 .....	2
McCarran v. United States (7th Cir.), 8 Fed. 2d 113 ....	5
Michelson v. United States, 335 U. S. 469 .....	5
Oyler v. Boles and Crabtree v. Boles, 368 U.S. 48, 82, Sup. Ct. 501, 503 .....	6
Smith v. United States (9th Cir.), 41 Fed. 2d 215 .....	5
Wigmore (Professor), 3d Ed., § 196 .....	8

## STATUTES

Article 62 of Vernon's Texas Criminal Code .....	2
Tennessee Habitual Criminal Act .....	5
Texas Code of Criminal Procedure .....	7

## CONSTITUTIONS

United States—Fifth Amendment .....	9
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NO. 69

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IN THE

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1966**

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**ROBERT A. BELL, JR.,**

*Petitioner*

**vs.**

**THE STATE OF TEXAS,**

*Respondent*

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

**REPLY BRIEF FOR THE PETITIONER**

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**I.**

Petitioner Bell has filed a supplemental brief with this Court and we respectfully request permission of the Court to file additional authorities and argument in answer thereto.

**II.**

**THE NECESSITY OF INJECTING PETITIONER'S  
PRIOR CRIMINAL RECORD INTO THE  
INSTANT CASE**

Petitioner Bell complains to this Court because the indictment reflecting he had been convicted of bank robbery in Federal Court was read to the jury during his trial in State Court and evidence was introduced in connection with this former conviction. Petitioner

Bell had the opportunity to admit identity. He elected not to do so. By his election, he required the State to prove the existence of a former conviction and his identity in relation thereto. Article 62 of Vernon's Texas Criminal Code provides for enhancement of punishment upon proof of conviction of a like offense. Since Petitioner Bell would not admit to his identity and the existence of such prior offense, then this proof became essential. The necessity for this proof was discussed in the case of *Graham v. West Virginia*, 224 U.S. 616, 32 Sup. Ct. 583, 56 L. Ed. 917. The decisions have been consistent since that time that the questions of identity and existence of the prior convictions are questions of fact to be determined by the jury in a jury trial.

Federal practice has long recognized the propriety of trying the issue of the former conviction together with the current charge. The Circuit Court of Appeals (8th Cir.) in *Massey v. United States*, 281 Fed. 293, review this procedure and set out the authorities applicable. After holding that it was not error to read an indictment to the jury containing information as to the current offense as well as prior convictions, the Court stated:

"Statutes providing for greater punishment of second or subsequent offenses by the same person have long been in force in this country and in England (*Graham v. West Virginia*, 224 U.S. 616, 623, 32 Sup. Ct. 583, 56 L. Ed. 917), and are to be found in the legislation of nearly every state in the Union. It is the established rule, under such statutes, unless the statute designates a different mode of procedure, that, if the prosecutor desires to invoke the severer punishment provided as to second or subsequent offenders, the indictment or

information must allege the fact of the prior conviction, and the allegation of such conviction must be proved in the trial to the jury. 1 Hale, P. C. 686; Reg. v. Jones, 6 C & P 391; Singer v. United States (C. C. A.) 278 Fed. 415, 420; Tuttle v. Com, 2 Gray (Mass.) 505, 506; Garvey v. Com., 8 Gray (Mass.) 382, 383; Commonwealth v. Walker, 163 Mass. 226, 228, 39 N.E. 1014; Walsh v. Commonwealth, 24 Mass. 39, 40, 112 N.E. 486; Johnson v. People of the State of N. Y., 55 N.Y. 512, 514; People v. Sickles, 156 N.Y. 541, 554, 546, 51 N.E. 288; People v. Craig, 195 N.Y. 190, 88 N.E. 38; Maguire v. State, 47 Md. 485, 496; Hall v. State, 121 Md. 577, 89 Atl. 111; Hines v. State, 26 Ga. 614, 616; McWhorter v. State, 118 Ga. 55, 56, 44 S.E. 873; People v. King, 64 Cal. 338, 340, 30 Pac. 1028; People v. Coleman, 145 Cal. 609, 612, 79 Pac. 283; Larney v. City of Cleveland, 34 Ohio St. 599, 600; Blackburn v. State, 50 Ohio St. 428, 436, 36 N.E. 18; Rausch v. Comm., 78 Pa. 490, 494; Commonwealth v. Payne, 242 Pa. 394, 399, 89 Atl. 559; Evans v. State, 150 Ind. 651, 653, 50 N.E. 820; State v. Smith, 129 Iowa, 709, 713, 106 N.W. 187, 4 L.R.A. (N.S.) 539, 6 Ann. Cas. 1023; Hoggett v. State, 101 Miss. 272, 273, 57 South. 812; Long v. State, 36 Tex. 6-9; Mitchell v. State, 52 Tex. Cr. R. 37, 39, 106 S.W. 124; Brittian v. State, 85 Tex. Cr. R. 491, 214 S.W. 351; Thompson v. State, 66 Fla. 206, 209, 63 South. 423; State v. Davis, 68 W. Va. 142, 151, 69 S.E. 639, 32 L.R.A. (N.S.) 501, Ann. Cas. 1912A, 996; State v. Savage, 86 W. Va. 655, 657, 104 S.E. 153; Hettle v. State, 144 Ark. 564, 222 S.W. 1066; State v. Compagno, 125 La. 669, 671, 672, 51 South. 681; State v. Reilly, 94 Conn. 698, 703, 110 Atl. 550; State v. Scheminsky, 31 Idaho, 504, 507, 174 Pac. 611; State v. Briggs, 94 Kan. 92, 95, 145 Pac. 866; State v. Findling, 123 Minn. 413, 416, 144 N.W. 142, 49 L.R.A. (N.S.) 449; State v. Reed, 132 Minn. 295, 296, 156 N.W. 127; State v. Manicke, 139 Mo. 545,



548, 41 S.W. 223; *Tucker v. State*, 14 Okl. Cr. 54, 57, 167 Pac. 637; *Wright v. State*, 16 Okl. 458, 460, 184 Pac. 158; *State v. Newlin*, 92 Or. 589, 596, 182 Pac. 133; *State v. Dale*, 110 Wash. 181, 184, 187, 188 Pac. 473; *Paetz v. State*, 129 Wis. 174, 177, 107 N.W. 1090, 9 Ann. Cas. 767; *Alzheimer v. State*, 165 Wis. 646, 647, 163 N.W. 255; *Bandy v. Hehn*, 10 Wyo. 167, 174, 67 Pac. 979.

"The same rule will be found stated in 1 Bishop, Cr. Law, §§961-1 to 963-3; Bishop, Stat. Cr. (3rd Ed.) §981; 1 Bish. Cr. Proc. §101-2; Bish. Dir. & Forms, §91; Wharton Cr. Pl. & Pr. (10th Ed.) §1877; 16 Corpus Juris, 1342, 1343; 22 Cyc. 356; note, 24 L.R.A. (N.S.) 436. The statement of a prior conviction is regarded as a part of the description and character of the offense intended to be punished, and as an essential ingredient of such aggravated offense. The accused is entitled to have the exact charge against him stated in the indictment or information, and to have the verdict of the jury upon the fact of a prior conviction for the same offense, and of his identity with the person so convicted, and it is the duty of the government which prosecutes to allege and prove the existence of the prior conviction of the accused as a fact that may cause a severer penalty to be imposed. The allegation and proof of the prior conviction does not prove a different crime from the one charged in the indictment or information on trial, and does not impair the right of trial by jury (*McDonald v. Massachusetts*, 180 U.S. 311, 313, 21 Sup. Ct. 389, 45 L. Ed. 542; *State v. Le Pitre*, 54 Wash. 166, 168, 103 Pac. 27, 18 Ann. Cas. 922; *People v. Sickles*, supra; *Maguire v. State*, supra; *Rand v. Com.*, 9 Grat. [Va.] 738, 743); and hence there was no error in allowing the information to be read to the jury at the beginning of the trial." (pages 297-298).

This same rule is reiterated in the cases of *McCarren v. United States* (7th Cir.) 8 Fed. 2d 113; *Smith v. United States* (9th Cir.) 41 Fed. 2d 215, and *Hefferman v. United States* (3rd Cir.) 50 Fed. 2d 554. These were not cases arising under state laws but were cases arising under the National Prohibition Act, which provided for enhancement of punishment for second and subsequent offenses.

We are not, however, limited to opinions from Circuit Courts of Appeals to find an expression of this rule. In addition to its recognition in a footnote in *Michelson v. United States*, 335 U.S. 469, discussed in our original brief, we would point out that Mr. Justice Hughes in *Graham v. West Virginia*, supra stated:

"While it is familiar practice to set forth in the indictment the fact of prior conviction of another offense, and to submit to the jury the evidence upon that issue together with that relating to the commission of the crime which the indictment charges, still in its nature it is a distinct issue, and it may appropriately be the subject of separate determination." (p. 625).

Somewhat later, this Court speaking through Mr. Chief Justice Warren in the case of *Chandler v. Fretag*, 348 U.S. 3, 75 Sup. Ct. 1, in discussing the Tennessee Habitual Criminal Act stated:

" 'Under section 6 of the Act,' according to the Tennessee Supreme Court, 'the question as to whether the defendant is an habitual criminal is one for the jury to decide.' *McCummings v. State*, 175 Tenn. 309, 311, 134 S.W. 2d 151, 152. In short, even though the Act does not create a separate offense, its applicability to any defendant charged with being an habitual criminal must be deter-

mined by a jury in a judicial hearing. Compare *Williams v. People of State of New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337. That hearing and the trial on the felony charge, although they may be conducted in a single proceeding, are essentially independent of each other. Thus, for example, it is possible that the jury in the instant case might have found petitioner guilty on the housebreaking and larceny charge and yet found him innocent of being an habitual criminal." (348 U.S. 8)

Again this Court in 1962, speaking through Mr. Justice Clark in *Oyler v. Boles* and *Crabtree v. Boles*, 368 U.S. 48, 82 Sup. Ct. 501, 503, stated:

"[2, 3] Even though an habitual criminal charge does not state a separate offense, the determination of whether one is an habitual criminal is 'essentially independent' of the determination of guilt on the underlying substantive offense. *Chandler v. Fretag*, 348 U.S. 3, 8, 75 S. Ct. 1, 4, 99 L. Ed. 4 (1954). Thus, although the habitual criminal issue *may be combined* with the trial of the felony charge, 'it is a distinct issue, and it may approximately be the subject of separate determination.' *Graham v. West Virginia*, 224 U.S. 616, 625, 32 S. Ct. 583, 586, 56 L. Ed. 917 (1912)." (Emphasis ours)

Thus this Court has recognized the use and given tacit approval to the practice of including information of prior convictions in the indictment. This Court has also recognized that the issue of identity as relates to the prior conviction must be presented to a jury in the absence of an admission by the defendant.

### III.

#### **SETTING OUT NUMEROUS LIKE OFFENSES IN A SINGLE INDICTMENT INJECTS THE ISSUE OF DEFENDANTS CHARACTER AND IS MORE PREJUDICIAL THAN INCLUDING ONLY A SINGLE PRIOR CONVICTION.**

While we realize it is a matter of opinion as to whether the inclusion of over 200 alleged like offenses in a single indictment is more prejudicial than the inclusion of only a single prior conviction, we submit that in both instances the character of the defendant has been injected into the case and becomes an issue. A jury is not likely to stop and consider whether or not all of the charges against a defendant can be proved. From the reading of the indictment, particularly one showing over 200 offenses, a jury would be much more likely to assume that a defendant was of bad character than if a single prior conviction were set out.

We submit, however, under the present rules both practices when applicable are constitutionally permissible. It is true that an indictment might be returned as to each Federal offense. At the same time, under Federal rules, indictment for multiple offenses is a standard and accepted practice. We agree that the new Texas Code of Criminal Procedure provides for the question of prior conviction to be presented to the jury for the first time after it has determined the question of guilt or innocence. We also submit that the prior practice of submitting the question of a former conviction together with the charge on the main case and for both to be tried before the same jury at the same time is likewise constitutionally permitted as reflected



by the prior opinions of this Court. We are not here to argue which is the better practice. It is sufficient that either practice is constitutional. Texas has now chosen to adopt a different method than that used at the trial of the instant case. The action of the Legislature in this regard does not make the previous practice unconstitutional and invalid as respects those cases that were tried under former procedure.

#### IV.

**EVIDENCE OF PRIOR CONVICTIONS WERE PROPERLY ADMISSIBLE IN THE PRESENT CASE.** While we recognize the general rule of evidence that the prior misdeeds of a defendant are not proper subjects for consideration by a jury, we are certain that this Court recognizes that there are a number of well defined exceptions to this rule. Without listing the number of other exceptions, we do think it sufficient to quote from Professor Wigmore, 3d Ed., §196:

“Under enlightened modern legislation for *habitual criminals*, the tribunal is authorized to increase the sentence of one whose offense, when established, is found to be the second or a later offense of the sort. The proof of the prior offense for the purpose does not militate against the rule forbidding the use of prior misconduct to evidence character, provided the purpose is kept distinct.”

We do concede that Professor Wigmore feels that allowing jurors to fix a criminal sentence is unwise and that furnishing them with information of prior convictions before a verdict is inferior to the other practice, but he does not criticize the rule as being constitutionally impermissive and in violation of the rights of the defendant.



We might ask that if this rule is a *procedural* one and has no affect on the determination of the guilt or innocence of the defendant, then is the defendant protected under the Fifth Amendment against giving information as to his identity and the prior conviction? We would think again if this rule is procedural only, that the Constitution would not prevent him from being placed under oath and questioned as to his identity concerning a former conviction. If he is not required to testify as to the current charge since the evidence of the prior conviction is not an essential element of the present offense and since he is admitting to no criminal act upon which he can be charged in the future, in what manner would his answer under oath to only these pertinent questions constitute self-incrimination? While we are sensitive to the rights of the individual as guaranteed by the Constitution of the United States, perhaps the State is derelict in not placing the defendant under oath and allowing him to testify as to these procedural matters. Certainly should the State take this course of action if Bell were granted a new trial, I do not doubt but that he would contend that the blanket of the Fifth Amendment protected him from answering these questions concerning a matter which he now contends is evidentiary and procedural.

## V.

**IF THE DECISION OF THIS COURT HOLDS THE FORMER TEXAS PROCEDURE TO BE UNCONSTITUTIONAL IT SHOULD NOT BE RETROACTIVE IN EFFECT.**

The State of Texas is asking should this Court find its former procedure for enhancement of punishment

to be unconstitutional, to make the application of the decision prospective only. The petitioner has challenged this request apparently on the mistaken belief that this Court would not reverse this cause for a new trial should prospective application be granted. The State of Texas is merely asking that respective application be given as was granted in *Linkletter v. Walker*, 381 U.S. 618, 85 Sup. Ct. 1731, 14 L. Ed. 2d 601, in order that decisions which are now final would not be affected.

## VI.

### **THERE IS NO QUESTION OF REASONABLE POSSIBILITY THAT THE INJECTION OF EVIDENCE OF PETITIONER'S PRIOR CONVICTION CONTRIBUTED TO HIS CONVICTION.**

The facts of this case are undisputed. Petitioner Bell was apprehended a short time after the commission of the alleged crime. The proceeds of the robbery were still in his possession. After escaping from the meat locker of his store in which he had been locked by the robber, the manager notified authorities of the robbery. Two highway patrolmen noticed defendant's car make an abrupt U-turn, apparently on sighting their vehicle and started following him. Defendant was stopped for exceeding the speed limit, vacated his automobile and rushed back to greet the officers. One of the officers walked up to the defendant's car and observed a gold-plated pistol on the front seat. The officers opened the car door and found the proceeds of the robbery on the floor of the car still in the sack which was later identified by the store manager as the identical sack in which the robber had forced him to place the money. After the apprehension of Petitioner Bell, the store

manager identified him as the individual who had committed the holdup. Bell did not take the stand and offer rebuttal testimony. The only evidence offered in his defense was the testimony of his mother who felt that he was temporarily insane at the time he committed the robbery because of various personal problems.

We strongly urge that this case clearly comes within the rules set out by this Court in *Fahy v. Connecticut*, 375 U.S. 85, 84 Sup. Ct. 229. We submit that there is not a reasonable possibility that the inclusion of the account in the indictment of the previous conviction of defendant and the evidence supporting this count might have contributed in any way to the conviction of the defendant. We base this conclusion on the fact that we do not believe that any unbiased jury of reasonable prudent men could have reached a different verdict with or without the charge and evidence of Petitioner's prior offense. We submit that this is a case in which the doctrine of harmless error should be applied even should the Court find that the procedure followed was constitutionally impermissible.

We would urge this Court to carefully weigh the purported violation of Petitioner's rights by injection of the prior conviction together with the overwhelming evidence of his guilt against the rights of society to be protected from further degradations on his part.

It is noted that in the printing of the Brief For Respondent in this case that the printer inserted a paragraph on page 12 that applied to the Reed case rather than to the case at hand and should be disregarded by the Court as it has no application herein.

## **CONCLUSION**

In reliance on the past decisions of this Court and for the reasons here and above set out, it is respectfully submitted the judgment of the Court below should be affirmed.

Respectfully submitted,

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By: -----  
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## **CERTIFICATE OF SERVICE**

The undersigned, a member of the Bar of Supreme Court of the United States, certifies that on the ---- day of October, 1966, a true and complete copy of the above and foregoing brief was forwarded to Tom R. Scott, 1006 Midland National Bank Building, Midland, Texas 79701, attorney for petitioner, by United States mail, first class, postage prepaid.

-----  
**HAWTHORNE PHILLIPS**

AUG 10 1966

JOHN F. DAVIS, CLERK

**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1966**

**No. 70**

---

**WILLIAM EVERETT REED,**

*Petitioner,*

*v.*

**DR. GEORGE J. BETO, Director, Texas Department  
of Corrections,**

*Respondent.*

---

**ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE UNITED STATES**

---

**BRIEF FOR THE PETITIONER**

---

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# INDEX

## SUBJECT INDEX

### BRIEF FOR PETITIONER

	Page
Opinion .....	1
Jurisdiction .....	1
Questions Presented .....	2
Statutes Involved .....	2
Statement .....	3
Summary of Argument .....	4

### ARGUMENT:

I. Informing a jury of an accused's prior conviction violates due process in that it deprives the accused of an impartial jury ....	5
II. The <i>Lane</i> principle should be applied retroactively .....	12
Conclusion .....	15
Appendix A .....	17

## CITATIONS

### CASES:

<i>Beeler v. State</i> , 206 Tenn. 160, 332 S. W. 2d 203 (1959) .....	11
<i>Beyer v. State</i> , 356 S. W. 2d 436 (Tex. Crim. App. 1959) .....	8
<i>Breen v. Beto</i> , 341 F. 2d 96 (5th Cir. 1965) .....	4
<i>Brown v. State</i> , 346 S. W. 2d 842 (Tex. Crim. App. 1961) .....	8
<i>Commonwealth v. Koczvara</i> , 397 Pa. 527, 155 A. 2d 825 (1959) .....	11
<i>Cummings v. State</i> , — Ark. —, 396 S. W. 2d 298 (1965) .....	11

	Page
<i>Dennis v. United States</i> , 339 U.S. 162 (1959) ....	7
<i>Fahy v. Connecticut</i> , 375 U.S. 85 (1963) .....	14
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963) .....	13, 14
<i>Gonzales v. State</i> , 389 S. W. 2d 306 (Tex. Crim. App. 1965) .....	14
<i>Harris v. State</i> , 369 P. 2d 187 (Okla. Crim. App. 1962) .....	11
<i>Harrison v. State</i> , — Tenn. —, 394 S. W. 2d 713 (1965) .....	11
<i>Heinze v. People</i> , 127 Colo. 54, 253 P. 2d 596 (1953) .....	11
<i>Higgins v. State</i> , 235 Ark. 153, 357 S. W. 2d 499 (1962) .....	11
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961) .....	6, 7, 12
<i>Jackson v. Denno</i> , 378 U.S. 368 (1964) .....	8, 13
<i>Johnson and Cassidy v. New Jersey</i> , — U.S. —, 34 L.W. 4592 (June 20, 1966) .....	13
<i>Lane v. Warden, Maryland Penitentiary</i> , 320 F. 2d 179 (4th Cir. 1963) .....	5, 8, 11, 12, 13
<i>Linkletter v. Walker</i> , 381 U.S. 618 (1965) .....	14
<i>Marshall v. United States</i> , 360 U.S. 310 (1959) ....	6
<i>Michelson v. United States</i> , 335 U.S. 469 (1948) ..	8
<i>Miller v. State</i> , 239 Ark. 836, 394 S. W. 2d 601 (1965) .....	11
<i>Murchison, In re</i> , 349 U.S. 133 (1955) .....	7
<i>Oler v. State</i> , 378 S. W. 2d 857 (Tex. Crim. App. 1964) .....	11
<i>Oliver, In re</i> , 333 U.S. 257 (1947) .....	6
<i>Palmer v. State</i> , 229 S. W. 2d 174 (Tex. Crim. App. 1950) .....	10
<i>People v. Hoerler</i> , 208 Cal. App. 2d 402, 25 Cal. Rep. 209 (Dist. Ct. App. 1962) .....	10
<i>Pitcock v. State</i> , 367 S. W. 2d 864 (Tex. Crim. App. 1963) .....	11

	Page
<i>Redding v. State</i> , 265 S. W. 2d 811 (Tex. Crim. App. 1954) .....	10
<i>Reed v. State</i> , 343 F. 2d 723, 353 S. W. 2d 850 (5th Cir. 1965) .....	1, 3
<i>Rex v. Jones</i> , 6th C. & P. 391, 172 Eng. Rep. 1290 (1834) .....	5-6
<i>Reyes, Ex parte</i> , 389 S. W. 2d 804 (Tex. Crim. App. 1964) .....	11
<i>Skaggs v. State</i> , 266 S. W. 2d 871 (Tex. Crim. App. 1954) .....	9
<i>State v. Compagno</i> , 125 La. 669, 51 So. 681 (1910) .....	10
<i>State v. Johnson</i> , 86 Idaho 51, 383 P. 2d 326 (1963) .....	11
<i>State v. Kirkpatrick</i> , 181 Wash. 313, 43 P. 2d 44 (1935) .....	11
<i>State v. Stewart</i> , 110 Utah 203, 171 P. 2d 383 (1946) .....	11
<i>State v. Tucker</i> , 142 W. Va. 830, 98 S. E. 2d 740 (1957) .....	10
<i>Thompson v. Louisville</i> , 362 U.S. 199 (1960) ....	6
<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927) .....	6, 8
<i>United States ex rel. Scoleri v. Banmiller</i> , 310 F. 2d 720 (3rd Cir. 1962) .....	12
<i>United States v. Wood</i> , 299 U.S. 123 (1936) ....	7

CONSTITUTIONAL PROVISIONS:

Fifth Amendment, Constitution of United States ..	2, 4
Sixth Amendment, Constitution of United States ..	2, 4
Fourteenth Amendment, Constitution of United States .....	2, 4, 6

## STATUTES:

	Page
28 U.S.C., Section 1254(1) .....	2
28 U.S.C., Section 2254 .....	4
Maryland R.P. 713 (1963) .....	11
Article 642, Texas Code of Criminal Procedure, 1925 .....	2
Article 37.07, Subsection 2(b), Texas Code of Criminal Procedure, 1966 .....	11
Article 38.01, Subsection 1, Texas Code of Crimi- nal Procedure, 1966 .....	11
Article 62, Texas Penal Code .....	8
Article 63, Texas Penal Code .....	2, 3, 8
Article 802(b), Texas Penal Code .....	9

## MISCELLANEOUS:

Brown, <i>The Treatment of the Recidivist in the United States</i> , 23 Canadian Bar Review 640 (1945) .....	9, 13
Cicero, <i>De Legibus I</i> , 10, 28 .....	14
Lacy, <i>Admissibility of Evidence of Crimes Not Charged in the Indictment</i> , 31 Ore. L. Rev. 267 (1952) .....	9
25 Mont. L. Rev. 250 (1964), <i>Note, Informing Jury of Defendant's Prior Convictions at Commence- ment of Trial Pursuant to Habitual Criminal Stat- ute Violated Due Process</i> .....	5
<i>Previous Convictions Act of England</i> , 6 & 7 Will. IV., c. III (1836); 24 & 25 Vict., c. 99 (1861) .....	5, 6
<i>Pro A. Chuentio Oratio</i> , c. 53, Section 146 .....	14
<i>Recidivist Procedures</i> , 40 N.Y.U. L. Rev. 332 (1965) ..	12

	Page
Stone, <i>The Rule of Exclusion of Similar Fact Evidence; America</i> , 51 Harv. L. Rev. 988 (1938) .....	9
<i>The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions</i> , 33 N.Y.U. L. Rev. 210 (1958) .....	12
9 Wigmore, <i>Evidence</i> , Section 2594a (3rd Ed. 1940)	12



**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1966**

**No. 70**

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**WILLIAM EVERETT REED,**

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**DR. GEORGE J. BETO, Director, Texas Department\*  
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*Respondent.*

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT  
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**BRIEF FOR THE PETITIONER**

---

**Opinion Below**

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 83-86) is reported at 343 F. 2d 723 (1965).

**Jurisdiction**

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 7, 1965 (R. 87). Petition for Rehearing (R. 88-89) was denied by the Appellate Court on May 11, 1965 (R. 90). Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma

Pauperis were filed and docketed as Number 268 Misc. on June 8, 1965. On January 31, 1966, the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis were granted by this Court (R. 91). The jurisdiction of this Court rests on 28 U.S.C., Section 1254(1).

### **Questions Presented**

1. Whether Petitioner was denied the right to a fair and impartial trial under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, and similar rights guaranteed him under the Constitution of the State of Texas, when the Indictment alleging prior felony convictions was read to the jury and proof thereon was heard by such jury prior to a finding of guilt upon the primary offense.
2. If Petitioner's position be sustained, whether or not the ruling should be applied retroactively.

### **Statutes Involved**

Article 63 of the Texas Penal Code provided as of the dates involved in this case:

**"Third conviction of felony**

Further, whoever shall have been three times convicted of a felony less than capital shall on such third conviction be in prison for life in the penitentiary."

Article 642, Texas Code of Criminal Procedure of 1925, provided as of the dates in this case:

**"Order of proceeding in trial**

A jury being impaneled in any criminal action, the cause shall proceed in the following order:

1. The indictment or information shall be read to the jury by the attorney prosecuting.
2. The special pleas, if any, shall be read by the defendant's counsel, and if the plea of not guilty is also relied upon, it shall also be stated.
3. The State's attorney shall state to the jury the nature of the accusation and the facts which are expected to be proved by the State in support thereof.
4. The testimony on the part of the State shall be offered.
5. The nature of the defenses relied upon and the facts expected to be proved in their support shall be stated by defendant's counsel.
6. The testimony on the part of the defendant shall be offered.
7. Rebutting testimony may be offered on the part of each party."

### **Statement**

Petitioner was convicted upon his plea of not guilty before a jury in the Texas Trial Court of the primary offense of burglary with two (2) prior convictions of ordinary felonies. Under Article 63 of the Texas Penal Code of 1925, his punishment was assessed at confinement for life in the penitentiary (R. 39-40). Such conviction was affirmed in *Reed v. State*, 353 S. W. 2d 850 (Tex. Crim. App. 1962), and Petitioner is presently in custody under such sentence in the Texas Penitentiary. Thereafter, Petitioner filed his Petition for Writ of Habeas Corpus in the United States District Court for the Southern District

of Texas, Houston Division, on the ground, *inter alia*, that such conviction denied to him due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, in that the reading of the allegations of the two (2) prior convictions and proof of the same to the jury, prior to determination of guilt by such jury, deprived him of his right to a fair trial (R. 1-4). The District Court dismissed the Petition for failure to exhaust available State remedies under 28 U.S.C., Section 2254 (R. 75-77). On appeal, the Court of Appeals held, under the special circumstances outlined in its opinion, there was no failure to exhaust such remedies. The cause was affirmed on the merits as being controlled by *Breen v. Beto*, 341 F. 2d 96 (5th Cir. 1965) (R. 83-86). It is undisputed that Petitioner was convicted after the jury was informed of Petitioner's prior convictions at the commencement of the trial (R. 39), and such prior convictions were proved to the jury before a finding of guilt (R. 45-59).

### Summary of Argument

The reading of the allegations of the prior convictions contained in the Indictment and the proof of such prior convictions, under the authorized and established procedure of Texas, deprived Petitioner of his right to a fair and impartial trial under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. The underlying purpose of the habitual offender statutes to protect society from persons persisting in crime do not override the assurance of a fair trial to determine if the accused has indeed so persisted, without extraneous and impermissible consideration of prior and unrelated acts. The decision in *Breen v. Beto*, 341 F. 2d 96 (5th Cir. 1965),

projects no valid reason for such overriding, in contrast to the contrary and well reasoned decision in *Lane v. Warden, Maryland Penitentiary*, 320 F. 2d 179 (4th Cir. 1963). The application of the *Lane* principle should have retroactive effect. The prejudicial procedure strikes at the heart of the fact-finding process from the beginning of the trial, making it impossible to be tried by an impartial jury, as constitutionally assured.

## ARGUMENT

### I.

**Informing a Jury of an Accused's Prior Conviction Violates Due Process in That It Deprives the Accused of an Impartial Jury.**

While the procedure obtaining in this cause has been described as the "common law" procedure, 25 Mont. L. Rev. 250, there is evidence, even prior to the passage of the Previous Convictions Act of England, 6 & 7 Will. IV., c. III. (1836); 24 & 25 Vict. c. 99 (1861), of a possible custom of refraining from informing the jury of such prior acts until after a finding of guilt on the subsequent offense:

"I never used to allow the jury to know anything of the previous conviction till they had given their opinion on the charge upon which the prisoner was to be tried; because I thought, that, if the jury were aware of the previous conviction it was (to use a common expression) like trying a man with a rope about his neck. However, the Judges have had a meeting on the subject . . . and they held my practice . . . was wrong . . . ." *Rex v. Jones*, 6th C. & P. 391, 172 Eng.



Rep. 1290 (1834), as quoted in 14 Temple L. Q. 386, 387, n. 15 (1940).

The overruling of the Judge in *Rex v. Jones, supra*, was promptly rectified in England by the passage of the Previous Convictions Act, providing that the accused must be found guilty of the primary offense before the jury can be advised of the prior offenses.

It is basic that an accused is presumed innocent, with the burden falling upon the State to establish guilt by material and relevant evidence. Without such evidence a conviction cannot stand. *Thompson v. Louisville*, 362 U.S. 199 (1960). *Irvin v. Dowd*, 366 U.S. 717 (1961), re-establishes that the due process clause of the Fourteenth Amendment to the Constitution of the United States guarantees to an accused the right to a fair trial by an impartial jury. The failure to accord a fair hearing violates the minimal standards of due process. *Irvin v. Dowd, supra*; *Re Oliver*, 333 U.S. 257 (1947); *Tumey v. Ohio*, 273 U.S. 510 (1927). As stated in *Irvin*, in essence the right to jury trial (provided for by State Constitutions) guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. There can be no due process or equal protection unless such principle remains inviolate.

The reasoning of *Marshall v. United States*, 360 U.S. 310 (1959), is that jurors' exposure to newspaper accounts reflecting prior convictions of the accused precludes a fair trial by an impartial jury, and this is so even though the jurors assert they are not prejudiced. While *Marshall* represents an exercise of this Court's supervisory power over Federal Courts, the full thrust of *Marshall* upon the

various States is made apparent through *Irvin*, bringing the matter within constitutional dimensions.

"Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular test and procedure, it is not chained to any ancient and artificial formula." *United States v. Wood*, 299 U.S. 123, 145-146 (1936).

A juror cannot be impartial when fixed in his mind is the historical fact that the accused has been previously convicted.

"A fair trial and a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

It is the essence of due process that a fair trial by an impartial jury means a jury untainted by prejudicial evidence or other stimuli. "The right to a fair trial is the right that stands guardian over all other rights." *Dennis v. United States*, 339 U.S. 162, 173 (1959), concurring opinion by Mr. Justice Jackson. Not only is that right denied where the jury is prejudiced by newspaper articles or other media, but the denial becomes more patent where the prejudice is imposed by the State of Texas.

"When a state deprives a person of liberty or property through a hearing held under statutes and circumstances which necessarily interfere with the course of justice, it deprives him of liberty and property without

due process of law." *Tumey v. Ohio*, 273 U.S. 510, 511 (1927).

*Jackson v. Denno*, 378 U.S. 368 (1964), is factually analogous. The rationale of *Denno* is that the jury might be impermissibly influenced by a confession found involuntary and thus not properly in evidence. A jury is similarly influenced in its examination of prior convictions, enmeshed with its function to determine guilt or innocence of the current offense.

Perhaps some distinction may be made as to jurisdictional prior offenses constituting elements of the current offense. It is this distinction Respondent failed to appreciate in its attempt to weaken the logic of *Lane* by urging upon this Court *Michelson v. United States*, 335 U.S. 469, 482, n. 4 (1948):

"This [rule] would be subject to some qualifications, as when a prior crime is an *element of the later offense*; for example, at a trial for being an habitual criminal. There are well-established exceptions where evidence as to other transactions or a course of fraudulent conduct is admitted to establish fraudulent intent as an element of the crime charged." (Emphasis added.)

The indulgence in such a distinction is here unnecessary. Under Texas law, prior convictions are not elements of the current offense and Article 63, Texas Penal Code, does not create an offense but, rather, prescribes a more severe punishment. *Beyer v. State*, 356 S. W. 2d 436 (Tex. Crim. App. 1962). The same interpretation has been placed upon a companion habitual statute, Article 62, Texas Penal Code. *Brown v. State*, 346 S. W. 2d 842 (Tex. Crim. App. 1961).

Respondent is perhaps confused by other repetition statutes, such as the Texas offense of driving while intoxicated, subsequent offense, Article 802(b), Texas Penal Code, in which instance proof of the prior offense is an essential ingredient of the current crime, without which there could be no conviction of the current offense. *Skaggs v. State*, 266 S. W. 2d 871 (Tex. Crim. App. 1954). Whether or not, even in such instances, matters of constitutional dimension are encountered is not here necessary to decision.

Admittedly, evidentiary exceptions are made to the universal rule excluding prior criminal acts of an accused, such as prior acts to show intent, identity, motive, plan or design. Such exceptions, however, are born of necessity to prove an issue in a criminal cause, a necessity not here applicable. Even as to such exceptions, undue prejudice flowing therefrom may, on occasion, outweigh the relevance. Stone, *The Rule of Exclusion of Similar Fact Evidence; America*, 51 Harv. L. Rev. 988 (1938); Lacy, *Admissibility of Evidence of Crimes Not Charged in the Indictment*, 31 Ore. L. Rev. 267 (1952).

The apparent purpose of recidivist statutes to protect society from persons who persist in the commission of crime is appreciated. Such statutes are recognized as necessary, though apparently enforced in a limited manner, in dealing with those persisting in crimes of a non-violent or lesser nature calling for punishment as to individual offenses of limited penal terms. Brown, *The Treatment of the Recidivist in the United States*, 23 Canadian Bar Rev. 640 (1945). Such considerations do not however, as apparently urged by Respondent, override the assurance of a fair trial of the accused to determine if he has indeed persisted in the

commission of crime without extraneous and impermissible consideration of prior and unrelated acts.

No logical reason has been advanced to justify the proceeding here questioned. An accused, more familiar with the Texas procedure when colloquially described as the "big bitch", is cognizant of the use, or threat of its use, to obtain pleas of guilty after being fully "advised" by a "cop-out" man from the District Attorney's office of the availability of such proceeding. Legal justification for such recidivist procedure has taken three (3) primary forms. Where, under the law of the jurisdiction, the jury fixes the sentence, as in Texas, the Courts have held the prior offenses must be pleaded and proven before the jury. *Redding v. State*, 265 S. W. 2d 811 (Tex. Crim. App. 1954). Other jurisdictions have ruled their statutes require such procedure. *People v. Hoerler*, 208 Cal. App. 2d 402, 25 Cal. Rep. 209 (Dist. Ct. App. 1962); *State v. Tucker*, 142 W. Va. 830, 98 S. E. 2d 740 (1957). Neither approach precludes a separate hearing after a determination of guilt on the current offense. Some jurisdictions justify the procedure here complained of on the theory that the accused must be accorded notice of proposed enhancement. *State v. Compagno*, 125 La. 669, 51 So. 681 (1910); *Palmer v. State*, 229 S. W. 2d 174 (Tex. Crim. App. 1950). Again, this does not appear to justify notice to the jury of the prior convictions before the jury verdict as to the current offense. If the procedure is not necessary—why does it linger? One with even limited exposure to the criminal courts has a clear concise answer—it is a prosecutor's darling. With such potent weapon, current weak cases can be won handily or, perhaps more prevalently, guilty pleas can be induced to the current offense.



The inherent unfairness has been recognized in many jurisdictions. Some Courts have changed the procedure by decree. *Heinze v. People*, 127 Colo. 54, 253 P. 2d 596 (1953); *State v. Johnson*, 86 Idaho 51, 383 P. 2d 326 (1963); *Harris v. State*, 369 P. 2d 187 (Okla. Crim. App. 1962); *Commonwealth v. Koczwara*, 397 Pa. 527, 155 A. 2d 825 (1959); *Beeler v. State*, 206 Tenn. 160, 332 S. W. 2d 203 (1959); *State v. Stewart*, 110 Utah 203, 171 P. 2d 383 (1946); *State v. Kirkpatrick*, 181 Wash. 313, 43 P. 2d 44 (1935). Prior to the final decision in *Lane*, Maryland revised its procedure by statute, Md. R. P. 713 (1963), and other State Courts have suggested or requested legislative changes. *Oler v. State*, 378 S. W. 2d 857 (Tex. Crim. App. 1964); *Higgins v. State*, 235 Ark. 153, 357 S. W. 2d 499 (1962). Recently the Arkansas and Tennessee Courts have declared the procedure complained of unconstitutional. *Miller v. State*, 239 Ark. 836, 394 S. W. 2d 601 (1965); *Harrison v. State*, — Tenn. —, 394 S. W. 2d 713 (1965) (prospective ruling); *Cummings v. State*, — Ark. —, 396 S. W. 2d 298 (1965) (retroactive ruling).

Prior to legislative change on January 1, 1966 (Article 38.01, subsection 1, and Article 37.07, subsection 2(b), Texas Code of Criminal Procedure of 1966), in an attempt to ameliorate the prejudicial situation, the Texas Court ruled the accused would be allowed to stipulate the prior convictions before trial, thus precluding the State from introducing such evidence. *Pitcock v. State*, 367 S. W. 2d 864 (Tex. Crim. App. 1963). Thereafter, the Court held that such a stipulation would allow a waiver of the reading of the prejudicial portion of the Indictment. *Ex parte Reyes*, 389 S. W. 2d 804 (Tex. Crim. App. 1964). Under Texas procedure, however, the stipulated facts would still be

required to be submitted to the jury at the end of the trial. 9 Wigmore, Evidence, Section 2594a at 597 (3d Ed. 1940).

While it would appear that the "common-law" procedure has been employed until recently in the majority of jurisdictions, such procedure has been supplanted by a bifurcated proceeding. 40 N.Y.U. L. Rev. 332 (1965); 33 N.Y.U. L. Rev. 210 (1958). The motivating force underlying all change is a frank recognition of a lack of a fair trial.

## II.

### The Lane Principle Should Be Applied Retroactively.

When an accused is denied the right to a fair and impartial jury, such denial strikes at the very basis of the fact-finding process demanding retroactive application. Such is the effect of this Court's decision in *Irvin v. Dowd*, 366 U.S. 717 (1961), a review of the denial of habeas corpus. The distinct function of the constitutional rule demanding an impartial jury is to allow an accused a fair trial. "The theory of the law is that a juror who has formed an opinion cannot be impartial. *Reynolds v. United States*, 98 U.S. 145." *Irvin v. Dowd*, *supra*, at 722. To speculate that an accused under the "common-law" procedure could have received a fair trial, touches the observation made by the Third Circuit in *United States ex rel. Scoleri v. Banmiller*, 310 F. 2d 720 (1962), that putting out of their minds the knowledge of the prior convictions while determining guilt or innocence would be "a feat of psychological wizardry [which] verges on the impossible even for berobed judges." Pointedly stated, "It is not reasonable to suppose that it could have been accomplished by twelve laymen brought together as a jury." 310 F. 2d 725. Under the habitual

proceeding in this cause, the right to counsel, competent as he may be, is totally ineffective to prevent prejudicial matter from being heard by the jury at the very beginning of the trial, thereby permeating the whole of the trial with a continuing and grave prejudice of a nature that would normally call for a reversal. As concluded in *Lane*, that such information is presented as a matter of historical fact smacks of even greater prejudice. As emphasized in *Johnson and Cassidy v. New Jersey*, — U.S. —, 34 L.W. 4592 at 4594, 4595, June 20, 1966; in *Gideon v. Wainwright*, 372 U.S. 335 (1963); and in *Jackson v. Denno*, 378 U.S. 368 (1964), this Court concluded "that retroactive application was justified because the rule affected 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the innocent.'" Concerning ourselves with the underlying consideration announced in *Johnson and Cassidy*, assuming prejudice of constitutional dimensions, what other safeguards in the premises "are available to protect the integrity of the truth-determining process at trial"?

Studies of the use and effect of the recidivist system has been limited. There is some indication that it is applied sparingly, but statistically it does not appear possible to ascertain the extent of usage. Brown, *The Treatment of the Recidivist in the United States*, 23 Canadian Bar Review 640, 658, 659 (1945). For the period ending December 31, 1965, of the twelve thousand eight hundred fifty-four (12,854) inmates in the Texas Department of Corrections, there were five hundred thirty-seven (537) inmates serving life sentences as habitual criminals. (See Appendix A.)

We are concerned here, not with an accused who has allegedly committed the most heinous of crimes. This is

the accused who has committed that crime or crimes which society, on an individual case by case basis, cannot consciously extract a more onerous penalty. The effect of retroactivity, seemingly demanded in trials by partial juries, would appear to touch a smaller number of inmates and would be far less as to convicts here affected than as to the *Gideon* inmates. Here, as in *Gideon*, one could not further claims of innocence or any violation of rights before a jury prejudiced against him. No judgment based upon such a proceeding is reliable. *Linkletter v. Walker*, 381 U.S. 618, 639, n. 20 (1965).

"We are born for justice, and right is not the mere arbitrary construction of opinion, but an institution of nature." Cicero, *De Legibus I.*, 10, 28. The tendency to prospective decision may convey that justice is mere utility and yet, by nature, it cannot be so, for "that which is established on account of utility for utility's sake be overturned." *Pro A. Cluentio Oratio*, c. 53, section 146. A holding here must transcend expediency to comport with human conscience. From a pragmatic view there is a concrete danger associated with prospective rulings. To those opposed to the constitutional holdings of this Court, time and delay appear as effective weapons in opposition to change. Thus, individual rights may continue to be trammelled in anticipation of mere prospective rulings. Indeed, it would seem this Court's rulings must be especially directed toward the Texas Appellate Court before the effect of rulings will be here felt. This is illustrated by the Texas refusal to follow this Court's opinion in *Fahy v. Connecticut*, 375 U.S. 85 (1963). *Gonzales v. State*, 389 S. W. 2d 306 (Tex. Crim. App. 1965). Constitutional pronouncements of this Court should serve to enhance the judging process of the State

judiciary. The course of judicial history in the State Courts reflects in many instances a lack of alertness to a possible change or modification comporting with a more enlightened sense of criminal justice. A certain sense of security may be found in purely prospective holdings of this Court by some State Courts, thus allowing continued confinement of the victims of any onerous process. This sense of security will hardly serve to enhance the judging process at the State level.

### **CONCLUSION**

**For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.**

**August , 1966.**

**Respectfully submitted,**

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***Counsel for Petitioner***



**APPENDIX A**

(Seal of the State of Texas)\*

**TEXAS DEPARTMENT OF CORRECTIONS**

**HUNTSVILLE, TEXAS 77340**

**July 18, 1966**

**Mr. Emmett Colvin Jr.  
1115 Fidelity Building  
1000 Maine Street  
Dallas, Texas**

**Dear Sir:**

This is in reference to our public service conversation of last week pertaining to securing a total of inmates who received Life sentences as Habitual Criminals.

In evaluating this problem, I checked with Mr. Bill Gaston from the Machine Records department and secured the following information: During the year of 1965 (ending December 31, 1965) there were a total of 12,854 active (ie. physically present) inmates in the Texas Department of Corrections. As of the before mentioned date there were 537 who were serving Life sentences as Habitual Criminals of the total of 12,854.

Please be assured of our continued support in all matters of mutual interest.

**Very truly yours,**

**/s/ HENRY R. SMALL  
Henry R. Small  
Bureau of Records and  
Identification**

**HRS:lje  
cc: File**

## TABLE OF CONTENTS

	Page
Opinion Below .....	1
Jurisdiction .....	1
Question Presented .....	2
Constitutional and Statutory Provisions Involved .....	2
Statement of the Nature of the Case .....	2
Argument and Authorities .....	2
Conclusion .....	13
Certificate of Service .....	14
Appendix "A" .....	15

## LIST OF AUTHORITIES

	Page
Baltimore Radio Show v. State, 67 A. 2d 497, 510, reversed on other grounds .....	9
Brandenburg v. Steele, 177 F. 2d 279 (8th Cir. 1949) .....	7
Braggs v. United States, 176 F. 2d 317, 321 (10th Cir. 1949) cert. den. 338 U.S. 861 .....	9
Breen v. Beto, 341 F. 2d 96 (5th Cir. 1965) .....	3
Finnegan v. United States, 204 F. 2d 105 (8th Cir. 1953) cert. den. 346 U.S. 821, reh. den. 346 U.S. 880 .....	8-9
Gianotos v. United States, 104 F. 2d 929 (8th Cir. 1939) ..	9
Ginzburg v. United States, — U.S. —, 34 S.W. 4255 (1966) .....	8
Gore v. United States, 244 F. 2d 763 (C.A.D.C. 1957) affirmed 357 U.S. 386 .....	9
Huff v. United States, 273 F. 2d 56 (5th Cir. 1959) .....	7
Johnson v. New Jersey, — U.S. —, 34 L.W. 4592 (Decided June 20, 1966) .....	10, 11
Lane v. Warden, Maryland Penitentiary, 320 F. 2d 179 (4th Cir. 1963) .....	3, 4, 5, 6, 7, 8, 9
Linkletter v. Walker, 381 U.S. 618 (1965) .....	10, 11
Mackie v. State, 367 S.W. 2d 697 (1963) .....	5
Michelson v. United States, 335 U.S. 469 (1948) .....	5, 6
Mishkin v. New York, — U.S. —, 34 L.W. 4250 (1966) ...	8
Reyes v. Beto, 345 F. 2d 722 .....	3

## LIST OF AUTHORITIES—Continued

	Page
Reed v. State, 353 S.W. 2d 850 (1962) .....	11
Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) .....	12
Roe v. United States, 316 F. 2d 617 (5th Cir. 1963) ....	6
Wendel Odell Stephens v. Beto, 377 S.W. 2d 139 (1964) cert. den. 380 U.S. 980, 85 S. Ct 1344 (1965) .....	3
Taylor v. Beto, 346 F. 2d 157 .....	3
Tehan v. Schott, 382 U.S. 406 (1966) .....	10, 11
United States v. Pullings, 321 F. 2d 287 (7th Cir. 1963) ..	9
United States v. Rabin, 316 F. 2d 564 (7th Cir. 1963) ....	8
United States v. Taylor, 207 F. 2d 437 (2nd Cir. 1953) ..	7
Williams v. United States, 317 F. 2d 545 (C.A.D.C. 1963) ..	9
Wolfe v. Nash, 313 F. 2d 393 (8th Cir. 1963) cert. den. 376 U.S. 933, 84 S. C. 705 (Feb. 24, 1964) .....	5

### STATUTES

#### United States

Rule 8, Federal Rules of Criminal Procedure .....	7
Rule 8(a), Federal Rules of Criminal Procedure .....	7
Rule 13, Federal Rules of Criminal Procedure .....	7

#### Texas

Article 63, Vernon's Annotated Penal Code .....	2
Articles 36.01, 37.07, Texas Code of Criminal Procedure, 1966 .....	12

### CONSTITUTIONS

#### United States

Sixth Amendment .....	2
Fourteenth Amendment .....	2

NO. 70

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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1966

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**WILLIAM EVERETT REED,**

*Petitioner*

v.

**DR. GEORGE J. BETO, DIRECTOR,  
TEXAS DEPARTMENT OF CORRECTIONS,**

*Respondent*

---

**On Writ of Certiorari to the Court of Appeals  
For the Fifth Circuit**

---

**BRIEF FOR THE RESPONDENT**

---

**TO THE HONORABLE SUPREME COURT OF  
THE UNITED STATES:**

**NOW COMES** Dr. George J. Beto, Respondent, in  
response and states:

**OPINION BELOW**

The opinion of the Court of Appeals is represented  
in 343 F. 2d 723, April 7, 1965.

**JURISDICTION**

It is respectfully submitted that no substantial federal question is presented for review of this Court.



## **QUESTION PRESENTED**

Has Petitioner been denied due process of law and equal protection of the laws under the Fourteenth Amendment to the United States Constitution as a result of a mandatory life sentence under Article 63, Vernon's Annotated Penal Code of the State of Texas, upon his conviction of a felony offense with two prior convictions alleged and proved for enhancement.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

These are cited in Petitioner's Brief.

## **STATEMENT OF THE NATURE OF THE CASE**

The facts as shown in Petitioner's Brief are substantially correct.

However, it should be noted that while the prior convictions were alleged in the indictment, read to the jury and proved up during the trial, the Court's charge carefully instructed the jury not to consider the prior convictions as evidence of guilt. (R. 36).

It should also be observed that Petitioner made no objection to the recidivist procedure now complained of either at the trial or on appeal. (R. 73, 77).

## **ARGUMENT AND AUTHORITIES**

### **I.**

The Texas habitual offender procedures in effect at the time of Petitioner's trial do not offend due process.

Petitioner was not denied due process of law under

the Sixth and Fourteenth Amendments to the Constitution of the United States because the indictment under which he was charged alleged two prior convictions and was read to the jury and proof of the prior convictions was made before the jury following the submission of proof of the principal offense. In support of this contention, Petitioner relies strongly on *Lane v. Warden, Maryland Penitentiary*, 320 F. 2d 179 (4th Cir. 1963).

The United States Court of Appeals for the Fifth Circuit undertook the determination of this question in the instant case in *Breen v. Beto*, 341 F. 2d 96 (5th Cir. 1965), which was decided on January 28, 1965. In that opinion, the Court disposes of *Lane v. Warden*, supra, with the following statement at page 97:

"In support of his contention, appellant cites and strongly relies on *Lane v. Warden*, 320 F(2) 179 (4th Cir. 1963). This court has never so held, and under the controlling Texas Statutes and the authorities we are not disposed to adopt or follow the cited opinion. On the contrary, we are of the firm view that that case was not well decided and that the correct view of the law is otherwise."

The Court of Appeals for the Fifth Circuit has also considered this matter in the cases of *Reyes v. Beto*, 345 F. 2d 722 and *Taylor v. Beto*, 346 F. 2d 157. The same contention was presented to the Supreme Court of the United States in the case of *Wendell Odell Stephens v. Beto*, 377 S.W. 2d 139 (1964), by way of application for writ of certiorari. This Court denied certiorari in 1965, 380 U.S. 980, 85 S. Ct. 1344, April 26, 1965.

By way of further discussion of *Lane v. Warden*, supra, Respondent submits the following.

In *Lane*, the Court of Appeals for the Fourth Circuit considered a conviction in a court of Maryland. The defendant was charged by indictment for selling narcotics and in the indictment two prior convictions were alleged for the purpose of enhancing punishment (actually there were three indictments, each charging a principal offense together with two prior convictions). The defendant objected to the reading of the indictments because they contained the prior convictions, but his objection was overruled. The Court of Appeals held that the reading of the indictments with their allegations of prior convictions denied the defendant a fair trial because the fairness of the jury was impaired by the knowledge of the defendant's prior criminal history.

Respondent disputes the applicability of *Lane v. Warden*, supra, urging that the facts of *Lane* are not analogous to the present case and also that the philosophy underlying the *Lane* decision is illogical and erroneous.

The *Lane* opinion at page 186 puts special emphasis on the proposition that the prejudice resulting from the reading of the two prior convictions to the jury could have been avoided by the State's following alternative Maryland procedures. No alternative methods of proving prior convictions are available under Texas practice.

Second, the defendant in *Lane* was charged under three indictments, each alleging the crime in issue, plus two prior convictions. Only one indictment is involved in the present case.

*However, regardless of the facts and circumstances which distinguish LANE V. WARDEN from the case be-*

*fore this Court, Respondent strongly urges that the reasoning in LANE v. WARDEN is specious and should not be followed.*

*Wolfe v. Nash*, 313 F. 2d 393 (8th Cir. 1963) cert. den. 376 U.S. 933, 84 S. Ct. 705 (Feb. 24, 1964) is directly contra to *Lane v. Warden*. In *Wolfe v. Nash*, the evidence of prior felony convictions of the defendant was offered in the presence of the jury and it was argued by the defendant that a fair trial was denied. The Court disposed of this proposition, saying at page 401:

"... How and in what way proof of prior convictions shall be made under the State Habitual Criminal statute and what effect a deviation from the requirements of the statute would have, we regard as purely a local legal problem and of no national concern whatever. The due process clause of the Fourteenth Amendment does not enable us to review errors of state law."

The Texas decisions have uniformly upheld the constitutionality of its habitual offender enhancement statutes. *Mackie v. State*, 367 S.W. 2d 697 (1963).

Not only is *Lane v. Warden* an innovation in criminal and constitutional law, its holding being in direct conflict to *Wolfe v. Nash*, the Fifth Circuit decisions, the Texas authorities, and innumerable other state decisions which have construed habitual offender acts, but *Lane* relies in part on authority that is apparently completely contradictory to the holding. At page 181 of the *Lane* opinion, the Court cites *Michelson v. United States*, 335 U.S. 469 (1948), and quotes at length from this opinion, sought to be distinguished by Respondent. The Court in *Lane* did observe in foot-

note number 4 at page 182 that the *Michelson* decision had some language which did not accord with the decision in *Lane*. *Lane* was referring to page 475 in *Michelson* where the Court observes:

"The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime."

*Michelson* then states in a footnote appended to this quotation that:

"This (rule) would be subject to some qualifications, as when a prior crime is an element of the later offense; for example, *at a trial for being an habitual criminal*. There are well-established exceptions where evidence as to other transactions or a course of fraudulent conduct is admitted to establish fraudulent intent as an element of the crime charged." (Emphasis added)

It is difficult to perceive how the *Lane* opinion could cite the *Michelson* case and then purport to distinguish it logically.

*Michelson* not only clearly suggests that the Supreme Court of the United States approves of the practice in habitual offender cases of informing the jury of prior convictions and offering proof thereof, but *Michelson* also points to the long and firmly entrenched rule that other, extraneous crimes, may be shown to establish intent. Along with intent, proof of extraneous crimes have been permitted to show identity, motive and plan or design. Proof before the jury of crimes committed by the defendant other than those charged in the indictment has been approved by this Court in *Roe v. United States*, 316 F. 2d 617 (5th Cir.



1963), and *Huff v. United States*, 273 F. 2d 56 (5th Cir. 1959).

*Lane v. Warden* also points out another area where the jury can properly be apprised of crimes which the defendant has committed other than the crime charged. This is where the defendant puts his character in issue through the use of character witnesses or by himself taking the stand and so permitting interrogation as to previous convictions.

The *Lane* theory that informing the jury of prior crimes must necessarily destroy the impartiality of the jury, is further refuted by the procedures authorized in Rules 8 and 13 of the Federal Rules of Criminal Procedure.

Rule 8 permits the joinder of two or more offenses in the same indictment as well as the joinder of defendants. Rule 13 authorizes the Court to order the consolidation of two or more indictments in a joint trial. Under the authority of these rules, promulgated by the Supreme Court of the United States, an information charging 225 separate and distinct crimes was upheld in *United States v. Taylor*, 207 F. 2d 437 (2nd Cir. 1953). In *Brandenburg v. Steele*, 177 F. 2d 279 (8th Cir. 1949), the defendant was indicted for 11 separate offenses of unlawful sales of narcotic drugs. In discussing Rules 8(a) and 13 of their predecessor statute, the Court observed:

"... In view of the statute and the Rules prescribed by the Supreme Court above referred to, which authorized the procedure which resulted in the appellant's conviction, it is obvious that he is entirely mistaken in his assertion about denial of due process. He was dealt with in accordance

with long established and conventional federal procedure."

This Court has recently considered charges involving a multi-count information in *Mishkin v. New York*, — U.S. —, 34 L.W. 4250 (1966), and *Ginzburg v. United States*, — U.S. —, 34 L.W. 4255 (1966). In *Mishkin* this Court considered a New York information charging 159 counts of obscenity. The defendant was convicted on 141 counts, and this Court affirmed the convictions without consideration or concern for the possible inherent prejudice that would accrue to a defendant charged under such an information.

In *Ginzburg*, a conviction under a Federal indictment charging 28 separate offenses of the federal obscenity statute was reviewed. Again this Court upheld the conviction without discussing possible prejudice that could arise under a multi-count indictment.

Under the philosophy of *Lane v. Warden*, the federal procedure in charging separate offenses in one indictment and the consolidation of indictments should be struck down and declared violative of the constitutional guarantee to a fair and impartial trial. Surely the impact upon the jury which *Lane* worries about (the reading of an indictment charging two previous convictions) is greater and more destructive to impartiality when an information charging 225 separate offenses is read or when an indictment charging 11, distinct, unlawful sales of narcotics is read. Nevertheless, the federal practice of using multiple-count indictments and the consolidation of indictments finds continued sanction in federal decisions. See *United States v. Rabin*, 316 F. 2d 564 (7th Cir. 1963); *Finnegan v.*

*United States*, 204 F. 2d 105 (8th Cir. 1953) cert. den. 346 U.S. 821, reh. den. 346 U.S. 880; *United States v. Pullings*, 321 F. 2d 287 (7th Cir. 1963); *Williams v. United States*, 317 F. 2d 545 (C.A.D.C. 1963). See also *Gore v. United States*, 244 F. 2d 763 (C.A.D.C. 1957) affirmed 357 U.S. 386.

Respondent does not quarrel with the general rule that evidence showing the accused has committed a crime or crimes independent of the crime charged is inadmissible. The basis of this tenet is that the tendency of such evidence to prejudice the jury outweighs the probative evidentiary value in the usual case. However, the rule is not a constitutional right, but rather is a rule of evidence. *Baltimore Radio Show v. State*, 67 A. 2d 497, 510, reversed on other grounds. The limitation on the admission of evidence of other crimes is subject to a number of exceptions, as have been noted above, the exceptions being founded on considerations of justice and wisdom just as is the exclusionary rule itself. *Gianotos v. United States*, 104 F. 2d 929 (8th Cir. 1939); *Braggs v. United States*, 176 F. 2d 317, 321 (10th Cir. 1949), cert. den. 338 U.S. 861. In the case of habitual offenders, the purpose of the statutes is to protect society from a person or from criminals who persist in the commission of crime and by serving as a warning to first offenders. *Gore v. United States*, supra. These considerations override, and logically so, the rule forbidding the introduction of and proof of other crimes.

Respondent submits that the Texas practice of handling habitual offenders in no way denies to defendants a fair and impartial trial under all principals, standards and doctrines of the law (except *Lane v. Warden*). Respondent does not say that there could not be a

better method of proving prior crimes for the purpose of enhancing punishment or a method that is more favorable to the defendant, but Respondent does maintain that the Texas procedure in no way contravenes any of the protections or rights guaranteed by the United States Constitution.

## II.

**Should this Court hold the Texas habitual offender statutes violative of due process, the decision should not be retroactively applied.**

Respondent strongly suggests that this Court determine that the recidivist statutes of Texas do not violate due process. However, should the Court determine otherwise, Respondent urges that any decision vitiating the recidivist procedures of Texas be given only prospective application.

This Court, in recent decisions, has abandoned the Blackstonian theory of judicial decisions which held that courts were discoverers and interpreters of the law rather than creators. Now it is conceded that the Court makes and creates new law. In these recent decisions, this Court has also become increasingly sensitive to the impact which newly defined constitutional rights have on the administration of state criminal laws and has restricted the applicability of these rights. See *Linkletter v. Walker*, 381 U.S. 618 (1965); *Tehan v. Shott*, 382 U.S. 406 (1966); *Johnson v. New Jersey*, — U.S. —, 34 L.W. 4592 (decided June 20, 1966).

The instant case, and others in which the Texas habitual offender procedures complained of here were involved, presents some of the considerations which the Supreme Court has thought important in limiting



a ruling which announces a new constitutional principle for observance by state courts. Here, the State of Texas came to rely on its recidivist procedures by the refusal of the Supreme Court to consider and condemn the practice throughout the many years of the rule's application. Furthermore, the condemnation of the Texas procedure would unquestionably seriously disrupt the administration of our criminal jurisprudence by the mass release of many prisoners whose conviction was obtained in a trial where the punishment enhancement statutes were applied.

Respondent is suggesting an extension of the principles announced by *Linkletter*, *Tehan*, and *Johnson v. New Jersey* that will permit a Federal Court to condemn a practice presented to it by habeas corpus proceedings or by certiorari, but provide by the decision that the ruling of the Court is not to apply to any case already tried including the case then before it. In other words, if the Court feels that a certain practice is violative of due process and the decision creates a new constitutional right applicable to state prosecutions, then the Federal Courts should announce that the rule is applicable only to cases which are tried after the date of the decision but is not applicable to the case in which the decision was rendered or to any other case tried prior to the decision date.

Here Petitioner's conviction became final in 1962 when the judgment of the trial court was affirmed by the Texas Court of Criminal Appeals in *Reed v. State*, 353 S.W. 2d 850 (June 10, 1962), and the time for applying for certiorari from this Court expired. Any rule announcing a constitutional right that would destroy the recidivist practice in Texas in operation at



that time should not, accordingly, be applied to the case now before the Court.

It should be observed that Texas has amended its habitual criminal procedure in its new Code of Criminal Procedure which became effective on January 1st of this year. Now the portions of the indictment charging prior offenses are not read to or proved before the jury until and unless the jury has returned a verdict of guilty with respect to the primary offense. See Articles 36.01 and 37.07, Texas Code of Criminal Procedure, 1966, copies of the pertinent portions being appended to this brief as Appendix "A." A state statute enacted since the commencement of litigation may bar a consideration of the Federal question presented even though the new statute is not applicable to the case under consideration. *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955).

Respondent does not mean to imply by the foregoing suggestions (that a new constitutional rule should be applied in a completely prospective manner) that it is felt that the old Texas recidivist practice offends the Constitution. Respondent again reiterates that such procedures in no way violate the Constitution and submits the prospective application theory as an alternative reason for upholding the conviction under consideration here.

## CONCLUSION

WHEREFORE, premises considered, Respondent prays the Court to affirm the holding of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

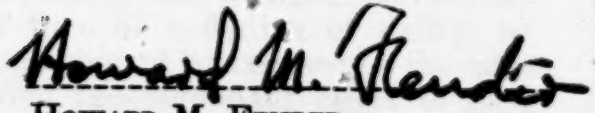
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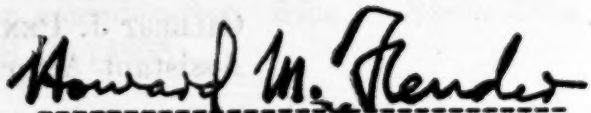


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Austin, Texas 78711

## CERTIFICATE OF SERVICE

I, Howard M. Fender, Assistant Attorney General of the State of Texas, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above captioned cause on behalf of the Respondent; I further certify that a copy of the foregoing Brief for the Respondent has been forwarded by United States Mails, first class, postage prepaid, to Mr. Charles W. Tessmer, 706 Main Street, Suite 400, Dallas, Texas 75202, Mr. Clyde W. Woody, Houston First Savings Building, Houston, Texas, and Mr. Emmett Colvin, Jr., 1115 Fidelity Building, 1000 Main Street, Dallas, Texas 75202, Attorneys for Petitioner this the ~~20th~~ day of September, 1966.



HOWARD M. FENDER

Assistant Attorney General

## APPENDIX "A"

Article 36.01, Texas Code of Criminal Procedure, 1966:

"A jury being impaneled in any criminal action, the cause shall proceed in the following order:

"1. The indictment or information shall be read to the jury by the attorney prosecuting. When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07.

" . . . . "

Article 37.07, Texas Code of Criminal Procedure, 1966:

" . . . . "

"2. Alternate procedure.

" . . . . "

"(b) If a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense charged where the same is not absolutely fixed by law to some particular penalty except when the defendant, upon the return of a finding of guilty, requests that the punishment be assessed by the same jury. In the event the defendant elects to have the jury fix the punishment in cases where the punishment is fixed by law, the court shall instruct the jury that if they find the defendant is the same person who was convicted in the prior conviction or convictions alleged for enhancement, they should set his punishment as prescribed by law.

"Regardless of whether the punishment be assessed by the judge or the jury, evidence may be offered by the State and the defendant as to the prior criminal record of the defendant, his general reputation and his character.

" . . . . "

# SUPREME COURT OF THE UNITED STATES

Nos. 68, 69, AND 70.—OCTOBER TERM, 1966.

Leon Spencer, Appellant, 68                    v. State of Texas.	} On Appeal From the Court of Criminal Appeals of Texas.
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Robert A. Bell, Jr., Petitioner, 69                    v. State of Texas.	} On Writ of Certiorari to the Court of Criminal Appeals of Texas.
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William Everett Reed, Petitioner, 70                    v. George J. Beto, Director, Texas Department of Corrections.	} On Writ of Certiorari to the United States Court of Ap- peals for the Fifth Circuit.
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[January 23, 1967.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

Texas, reflecting widely established policies in the criminal law of this country, has long had on its books so-called recidivist or habitual-criminal statutes. Their effect is to enhance the punishment of those found guilty of crime who are also shown to have been convicted of other crimes in the past. The three cases at hand challenge the procedures employed by Texas in the enforcement of such statutes.<sup>1</sup>

<sup>1</sup> The recidivist statutes here involved are Articles 62, 63, and 64 of the Texas Penal Code (1952 ed.).

Article 62 provides: "If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases."

Articles 63 provides: "Whoever shall have been three times con-



Until recently, and at the time of the convictions before us, the essence of those procedures was that, through allegations in the indictment and the introduction of proof respecting a defendant's past convictions, the trial jury in the pending charge was fully informed of such previous derelictions, but was also charged by the court that such matters were not to be taken into account in assessing the defendant's guilt or innocence under the current indictment.<sup>2</sup>

The facts in the cases now here are these. In *Spencer* (No. 68), the petitioner<sup>3</sup> was indicted for murder, with

victed of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

Article 64 provides: "A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary."

<sup>2</sup> These procedures were embodied in Vernon's Ann. Code of Criminal Procedure, Art. 642 (1941 ed.), providing as follows: "A jury being impaneled in any criminal action, the cause shall proceed in the following order: 1. The indictment or information shall be read to the jury by the attorney prosecuting. . . . 4. The testimony on the part of the State shall be offered." By judicial gloss it appears that, at least in noncapital cases, a defendant by stipulating his prior convictions could keep knowledge of them away from the jury. See *Pitcock v. State*, — Tex. Crim. Rep. —, 367 S. W. 2d 864. But see the decision below in *Spencer*, — Tex. Crim. Rep. —, 389 S. W. 2d 304, for the inapplicability of the stipulation rule in capital cases. In the view we take of the constitutional issue before us we consider it immaterial whether or not that course was open to any of the petitioners. Subsequent to the present convictions Texas has passed a new law respecting the procedure governing recidivist cases, the effect of which seems to be that except in capital cases the jury is not given the recidivist issue until it has first found the defendant guilty under the principal charge. Texas Penal Code, Art. 36.01, effective January 1, 1966. Since these cases were all tried under the older procedure, the new statute is not before us.

<sup>3</sup> The question of whether *Spencer* is properly here as an appeal, a matter which we postponed to consideration of the merits, is a

malice, of his common-law wife. The indictment alleged that the defendant had previously been convicted of murder with malice, a factor which if proved would entitle the jury to sentence the defendant to death or to prison for not less than life under Texas Penal Code, Art. 64, note 1; *supra*, whereas if the prior conviction was not proved the jury could fix the penalty at death or a prison term of not less than two years, see Texas Penal Code, Art. 1257. Spencer made timely objections to the reading to the jury of that portion of the indictment, and objected as well to the introduction of evidence to show his prior conviction. The jury was charged that if it found that Spencer had maliciously killed the victim, and that he had previously been convicted of murder with malice, the jury was to "assess his punishment at death or confinement in the penitentiary for life." The jury was instructed as well that it should not consider the prior conviction as any evidence of the defendant's guilt on the charge on which he was being tried. Spencer was found guilty and sentenced to death.

In *Bell* (No. 69), the petitioner was indicted for robbery, and the indictment alleged that he had been perviously convicted of bank robbery in the United States District Court for the Southern District of Texas. Bell moved to quash the indictment on the ground, similar to that in *Spencer*, that the allegation and reading to the jury of a prior offense was prejudicial and would deprive him of a fair trial. Similar objections

tangled one. See *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282; Hart & Wechsler, *The Federal Courts and the Federal System*, 565-567 (1953). Rather than undertake to resolve it, we think it more profitable to dismiss this appeal and treat it as a petition for certiorari, 28 U. S. C. § 2103 (1964 ed.), particularly as there is pending in the Court Spencer's timely filed alternative petition for certiorari, which has been held to await the outcome of this appeal. Accordingly we have in this opinion referred to Spencer as a "petitioner."

were made to the offer of documentary evidence to prove the prior conviction. The court's charge to the jury stated that the prior conviction should not be considered in passing upon the issue of guilt or innocence on the primary charge. The sentencing procedure in this non-capital case was somewhat different from that in *Spencer*. The jury was instructed that if it found the defendant guilty only of the present robbery charge, it could fix his sentence at not less than five years nor more than life. See Texas Penal Code, Art. 1408. But if it found that Bell had also been previously convicted as alleged in the indictment, it should bring in a verdict of guilty of robbery by assault and a further finding that the allegations "charging a final conviction for the offense of bank robbery are true." The jury so found, and the judge fixed punishment, set by law for such a prior offender, at life imprisonment in the penitentiary. See Texas Penal Code, Art. 62, note 1, *supra*.

The *Reed* case (No. 70),<sup>4</sup> involving a third-offender prosecution for burglary, see Texas Penal Code, Art. 63, note 1, *supra*, entailed the same practice as followed in *Bell*.

The common and sole constitutional claim made in these cases is that Texas' use of prior convictions in the current criminal trial of each petitioner was so egregiously unfair upon the issue of guilt or innocence as to offend the provisions of the Fourteenth Amendment that no State shall "deprive any person of life, liberty, or property without due process of law . . . ." We took these cases for review, 382 U. S. 1022, 1023, 1025, be-

<sup>4</sup> The *Reed* case, unlike the *Spencer* and *Bell* cases which come to us from the Court of Criminal Appeals of Texas, is here from a judgment of the United States Court of Appeals for the Fifth Circuit affirming the District Court's dismissal of a writ of habeas corpus on the ground that the Texas recidivist procedure did not offend the United States Constitution. 343 F. 2d 723.

cause the Courts of Appeals have divided on the issue.\* For reasons now to follow we affirm the judgments below.

The road to decision, it seems to us, is clearly indicated both by what the petitioners in these cases do *not* contend and by the course of the authorities in closely related fields. No claim is made here that recidivist statutes are themselves unconstitutional, nor could there be under our cases. Such statutes and other enhanced sentence laws, and procedures designed to implement their underlying policies, have been enacted in all the States,<sup>6</sup> and by the Federal Government as well. See, e. g., 18 U. S. C. § 2114 (1964 ed.); Fed. Rules Crim. Proc. 32 (c)(2); D. C. Code § 22-104 (1961 ed.). Such statutes, though not in the precise procedural circumstances here involved, have been sustained in this Court on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities. *Moore v. Missouri*, 159 U. S. 673; *McDonald v. Massachusetts*, 180 U. S. 311; *Graham v. West Virginia*, 224 U. S. 616; *Gryger v. Burke*, 334 U. S. 728; *Oyler v. Boles*, 368 U. S. 448.

<sup>6</sup> The Third Circuit in *United States v. Banmiller*, 310 F. 2d 720, held a similar Pennsylvania procedure, when applied in capital cases, unconstitutional. The Fourth Circuit held a comparable Maryland recidivist practice unconstitutional in all cases. *Lane v. Warden*, 320 F. 2d 179. The Fifth Circuit in *Breen v. Beto*, 341 F. 2d 96, and again in the *Reed* case before us today, 343 F. 2d 723, and the Eighth Circuit in *Wolfe v. Nash*, 313 F. 2d 393, have held such procedures constitutional. The Ninth Circuit in *Powell v. United States*, 35 F. 2d 941, sustained the procedure in the context of a second offense under § 29 of the National Prohibition Act, 41 Stat. 316.

<sup>7</sup> See annotations at 58 A. L. R. 20, 82 A. L. R. 345, 79 A. L. R. 2d 826; Note, Recidivist Procedures, 40 N. Y. U. L. Rev. 332 (1965).



Nor is it contended that it is unconstitutional for the jury to assess the punishment to be meted out to a defendant in a capital or other criminal case, or to make findings as to whether there was or was not a prior conviction even though enhanced punishment is left to be imposed by the judge. The States have always been given wide leeway in dividing responsibility between judge and jury in criminal cases. *Hallinger v. Davis*, 146 U. S. 314; *Maxwell v. Dow*, 176 U. S. 581; cf. *Chandler v. Fretag*, 348 U. S. 3; *Giaccio v. Pennsylvania*, 382 U. S. 399, 405, n. 8.

Petitioners do not even appear to be arguing that the Constitution is infringed if a jury is told of a defendant's prior crimes. The rules concerning evidence of prior offenses are complex, and vary from jurisdiction to jurisdiction, but they can be summarized broadly. Because such evidence is generally recognized to have potentiality for prejudice, it is usually excluded except when it is particularly probative in showing such things as intent, *Nye & Nissen v. United States*, 336 U. S. 613; *Ellisor v. State*, 162 Tex. Crim. Rep. 117, 282 S. W. 2d 393, an element in the crime, *Doyle v. State*, 59 Tex. Crim. Rep. 39, 126 S. W. 1131, identity, *Chavira v. State*, 167 Tex. Crim. Rep. 197, 319 S. W. 2d 115, malice, *Moss v. State*, — Tex. Crim. Rep. —; 364 S. W. 2d 389, motive, *Moses v. State*, 168 Tex. Crim. Rep. 409, 328 S. W. 2d 885, a system of criminal activity, *Haley v. State*, 87 Tex. Crim. Rep. 519, 223 S. W. 202, or when the defendant has raised the issue of his character, *Michelson v. United States*, 335 U. S. 469; *Perkins v. State*, 152 Tex. Crim. Rep. 321, 213 S. W. 2d 681, or when the defendant has testified and the State seeks to impeach his credibility, *Giacone v. State*, 124 Tex. Crim. Rep. 141, 62 S. W. 2d 986.<sup>1</sup>

<sup>1</sup> These Texas cases reflect the rules prevailing in nearly all common-law jurisdictions. See generally McCormick on Evidence



Under Texas law the prior convictions of the defendants in the three cases before the Court today might have been admissible for any one or more of these universally accepted reasons. In all these situations, as under the recidivist statutes, the jury learns of prior crimes committed by the defendant, but the conceded possibility of prejudice is believed to be outweighed by the validity of the State's purpose in permitting introduction of the evidence. The defendants' interests are protected by limiting instructions, see *Giacone v. State, supra*, and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence even though admissible under an accepted rule of evidence. See *Spears v. State*, 153 Tex. Crim. Rep. 14, 216 S. W. 2d 812; 1 Wigmore on Evidence § 29a (1940 ed.); Uniform Rule of Evidence 45; Model Code of Evidence, Rule 303.

This general survey sufficiently indicates that the law of evidence, which has been chiefly developed by the States, has evolved a set of rules designed to reconcile the possibility that this type of information will have some prejudicial effect with the admitted usefulness it has as a factor to be considered by the jury for any one of a large number of valid purposes. The evidence itself

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§§ 157-158 (1954 ed.); 1 Wharton's Criminal Evidence §§ 221-243 (Anderson ed., 1955); 1 Wigmore on Evidence §§ 215-218 (1964 ed.); Note, Other Crimes Evidence at Trial, 70 Yale L. J. 763 (1961). For the English rules, substantially similar, see Cross, Evidence 292-333 (2d ed. 1963). Recent commentators have criticized the rule of general exclusion, and have suggested a broader range of admissibility. Model Code of Evidence, Rule 311; Carter, The Admissibility of Evidence of Similar Facts, 69 L. Q. Rev. 80 (1953), 70 L. Q. Rev. 214 (1954); Note, Procedural Protections of the Criminal Defendant, 78 Harv. L. Rev. 426, 435-451 (1964). For the use of this type of evidence in continental jurisdictions, see Glanville Williams, The Proof of Guilt 181 (2d ed. 1958); 1 Wigmore, *supra*, § 193.

is usually, and in recidivist cases almost always, of a documentary kind, and in the cases before us there is no claim that its presentation was in any way inflammatory. Compare *Marshall v. United States*, 360 U. S. 310. To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence. For example, all joint trials, whether of several codefendants or of one defendant charged with multiple offenses, furnish inherent opportunities for unfairness when evidence submitted as to one crime (on which there may be an acquittal) may influence the jury as to a totally different charge. See *Delli Paoli v. United States*, 352 U. S. 232; cf. *Opper v. United States*, 348 U. S. 84; *Krulewitch v. United States*, 336 U. S. 440. This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest.

Such an approach was in fact taken by the Court in *Michelson v. United States*, 335 U. S. 469. There, in a federal prosecution, the Government was permitted to cross-examine defense witnesses as to the defendant's character and to question them about a prior conviction. The Court, recognizing the prejudicial effect of this evidence, noted that "limiting instructions on this subject are no more difficult to comprehend or apply than those upon various other subjects," *id.*, at 485, and held that this Court was not the best forum for developing rules of evidence, and would, therefore, not proscribe the long-

standing practice at issue. *A fortiori*, this reasoning applies in the cases before us today which arise not under what has been termed the supervisory power of this Court over proceedings in the lower federal courts, see *Cheff v. Schnackenberg*, 384 U. S. 373, but in the form of a constitutional claim that would require us to fashion rules of procedure and evidence in state courts. It is noteworthy that nowhere in *Michelson* did the Court or dissenting opinions approach the issue in constitutional terms.

It is contended nonetheless that in this instance the Due Process Clause of the Fourteenth Amendment requires the exclusion of prejudicial evidence of prior convictions even though limiting instructions are given and even though a valid state purpose—enforcement of the habitual offender statute—is served. We recognize that the use of prior-crime evidence in a one-stage recidivist trial may be thought to represent a less cogent state interest than does its use for other purposes, in that other procedures for applying enhancement-of-sentence statutes may be available to the State that are not suited in the other situations in which such evidence is introduced. We do not think that this distinction should lead to a different constitutional result.

Cases in this Court have long acted on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. See, *e. g.*, *Tumey v. Ohio*, 273 U. S. 510; *Betts v. Brady*, 316 U. S. 455; cf. *Gideon v. Wainwright*, 372 U. S. 335; see *Estes v. Texas*, 381 U. S. 532; *Sheppard v. Maxwell*, 384 U. S. 333; cf. *Griffin v. Illinois*, 351 U. S. 12. But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority. In the face of the legitimate state purpose and the long-standing and widespread use that

attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases. As Mr. Justice Cardozo had occasion to remark, a state rule of law "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." *Snyder v. Massachusetts*, 291 U. S. 97, 105. See also *Buchalter v. New York*, 319 U. S. 427.

Petitioners' reliance on *Jackson v. Denno*, 378 U. S. 368, is misplaced. There the Court held unconstitutional the New York procedure leaving to the trial jury alone the issue of the voluntariness of a challenged confession, an area of law that has been characterized by the development of particularly stiff constitutional rules. See *Rogers v. Richmond*, 365 U. S. 534; *Miranda v. Arizona*, 384 U. S. 436. The Court held that a judicial ruling was first required to determine whether as a matter of law—federal constitutional law—the confession could be deemed voluntary. This requirement of a threshold hearing before a judge on the federal question of voluntariness lends no solid support to the argument made here—that a two-stage jury trial is required whenever a State seeks to invoke an habitual offender statute. It is true that the Court in *Jackson* supported its holding by reasoning that a general jury verdict was not a "reliable" vehicle for determining the issue of voluntariness because jurors might have difficulty in separating the issues of voluntariness from that of guilt or innocence. But the emphasis there was on protection of a specific constitutional right, and the *Jackson* procedure was designed as a specific remedy to ensure that an involuntary confession was not in fact relied upon by the jury. In the procedures before us, in contrast, no specific



federal right—such as that dealing with confessions—is involved; reliance is placed solely on a general “fairness” approach. In this area the Court has always moved with caution before striking down state procedures. It would be extravagant in the extreme to take *Jackson* as evincing a general distrust on the part of this Court of the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge in a criminal case, or as standing for the proposition that limiting instructions can never purge the erroneous introduction of evidence or limit evidence to its rightful purpose. Compare *Opper v. United States*, 348 U. S. 84; *Leland v. Oregon*, 343 U. S. 790.\*

It is fair to say that neither the *Jackson* case nor any other due process decision of this Court even remotely supports the proposition that the States are not free to enact habitual offender statutes of the type Texas has chosen and to admit evidence during trial tending to prove allegations required under the statutory scheme.

Tolerance for a spectrum of state procedures dealing with a common problem of law enforcement is especially appropriate here. The rate of recidivism is acknowledged to be high,<sup>8</sup> a wide variety of methods of dealing with the problem exists, and experimentation is in prog-

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\* Indeed the most recent scholarly study of jury behavior does not sustain the premise that juries are especially prone to prejudice when prior crime evidence is admitted as to credibility. Kalven & Zeisel, *The American Jury* (1966). The study contrasts the effect of such evidence on judges and juries and concludes that “Neither the one nor the other can be said to be distinctively gullible or skeptical.” *Id.*, at 180.

<sup>8</sup> See “Careers in Crime,” a statistical survey collected in Uniform Crime Reports for the United States—1965 (Dept. of Justice, 1966). The Statistical Abstract of the United States, 1966, reveals that 62% of prisoners committed to federal prisons in the year ending June 30, 1965, had been previously committed. *Id.*, at 163.



ress. The common-law procedure for applying recidivist statutes, used by Texas in the cases before us, which requires allegations and proof of past convictions in the current trial, is, of course, the simplest and best known procedure.<sup>10</sup> Some jurisdictions deal with the recidivist issue in a totally separate proceeding, see, *e. g.*, *Oyler v. Boles*, 368 U. S. 448, and as already observed (note 2, *supra*) Texas to some extent has recently changed to that course. In some States such a proceeding can be instituted even after conviction on the new substantive offense, see Ore. Rev. Stat. § 168.04 (1959 Supp.); *Graham v. West Virginia*, 224 U. S. 616. The method for determining prior convictions varies also between jurisdictions affording a jury trial on this issue, *e. g.*, Fla Stat. Ann. § 775.11 (1944 ed.), and those leaving that question to the court, see, *e. g.*, Fed. Rule Crim. Proc. 32 (a); Mo. Rev. Stat. § 556.280 (2) (1966 Supp.).<sup>11</sup> Another procedure, used in Great Britain and Connecticut, see Coinage Offences Act, 1861, 24 & 25 Vic., c. 99; *State v. Ferrone*, 96 Conn. 160, 113 A. 452, requires that the indictment allege both the substantive crime and the prior conviction, that both parts be read to the defendant prior to trial, but that only the allegations relating to the substantive crime be read to the jury. If the defendant is convicted, the prior-offense elements are then read to the jury which considers any factual issues raised. Yet another system relies upon the parole authorities to withhold parole in accordance with their findings as to prior

<sup>10</sup> For a survey and analysis of the various recidivist procedures, see Note, Recidivist Procedures, 40 N. Y. U. L. Rev. 332 (1965); see also Note, The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions, 33 N. Y. U. L. Rev. 210 (1958).

<sup>11</sup> Texas juries have had authority to impose punishment since 1846, but in all but 11 States this power is held by the judge. See Reid, The Texas Code of Criminal Procedure, 44 Tex. L. Rev. 983, 1008-1009 (1966).

convictions. See, e. g., N. J. Stat. Ann. § 30:4-123.12 (1964 ed.). And within each broad approach described, other variations occur.

A determination of the "best" recidivist trial procedure necessarily involves a consideration of a wide variety of criteria, such as which method provides most adequate notice to the defendant and an opportunity to challenge the accuracy and validity of the alleged prior convictions, which method best meets the particular jurisdiction's allocation of responsibility between court and jury, which method is best accommodated to the State's established trial procedures, and of course which method is apt to be the least prejudicial in terms of the effect of prior-crime evidence on the ultimate issue of guilt or innocence. To say that the two-stage jury trial on the English-Connecticut style is probably the fairest, as some commentators and courts have suggested,<sup>12</sup> and with which we might well agree were the

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<sup>12</sup> See, e. g., *Lane v. Warden*, 320 F. 2d 179; Note, 40 N. Y. U. L. Rev. 332, 348 (1965). Other commentators have cautioned against a too hasty adoption of the two-stage trial. See the Second Circuit decision in *United States v. Curry*, 358 F. 2d 904, 914-915, where the court discussed the procedure as it applied in federal capital cases, and concluded: "Given the many considerations which may affect the necessity for a two-stage trial in each case, and considering the questionable desirability of this untested technique, we think it best to leave this question to the discretion of the trial court." See also the discussion of the practical and administrative disadvantages of such a procedure in *Fradley v. United States*, 348 F. 2d 84, 114-115 (dissenting opinion). We have been presented with no positive information concerning actual experience with a separate penalty procedure that would bear on a decision to impose it upon all the States as a matter of constitutional law. One study suggests that as a practical matter such a procedure has not proved helpful to defendants: "The California experience, dating back to 1957, has rather been that defense counsel have often neglected to prepare adequately for the penalty phase and have exhibited a lack of sophis-

matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment. Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure.<sup>12</sup> With recidivism the major problem that it is, substantial changes in trial procedure in countless local courts around the country would be required were this Court to sustain the contentions made by these petitioners. This we are unwilling to do. To take such a step would be quite beyond the pale of this Court's proper function in our federal system. It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution, which these rules are not. The judgments in these cases are

*Affirmed.*

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tification concerning what facts should be advanced as mitigating. Apparently, the approach of defense lawyers has been to devote the bulk of their efforts to the substantive issue of guilt and to relegate the penalty phase to a minor role. On the other hand, the prosecution has taken complete advantage of the penalty phase and has attempted to marshal and to present to the jury all of the aggravating circumstances that exist." Note, Executive Clemency in Capital Cases, 39 N. Y. U. L. Rev. 136, 167 (1964).

<sup>12</sup> In cases where, as in *Spencer*, a jury itself fixes the penalty, the effect of the dissenting opinion's emphasis upon the use of a stipulation would in reality be to require, as a matter of federal constitutional law, a two-stage jury trial. For a stipulation no less than evidentiary proof would bring the fact of prior convictions before the trial jury.

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Texas Department of                    } peals for the Fifth Circuit.  
Corrections.                    }

[January 23, 1967.]

MR. JUSTICE STEWART, concurring.

If the Constitution gave me a roving commission to impose upon the criminal courts of Texas my own notions of enlightened policy, I would not join the Court's opinion. For it is clear to me that the recidivist procedures adopted in recent years by many other States<sup>1</sup>—and by Texas herself since January 1 of last year<sup>2</sup>—are far superior to those utilized in the cases now before us. But the question for decision is not whether we applaud or even whether we personally approve the procedures followed in these recidivist cases. The question is whether those procedures fall below the minimum level the Fourteenth Amendment will tolerate. Upon that question I am constrained to join the opinion and judgment of the Court.

<sup>1</sup> See dissenting opinion of THE CHIEF JUSTICE, p. 18, n. 11, *infra*.

<sup>2</sup> See opinion of the Court, p. 2, n. 2, *supra*.



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[January 23, 1967.]

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE FORTAS concurs, dissenting in Nos. 68 and 69, and concurring in No. 70.

It seems to me that the only argument made by the Court which might support its disposition of this case is the amorphous one that this Court should proceed hesitantly in dealing with courtroom procedures which are alleged to violate the Due Process Clause of the Fourteenth Amendment. It attempts to bolster its decision with arguments about the conceded validity of the purpose of recidivist statutes and by pointing to occasions when evidence of prior crimes is traditionally admitted to serve a specific purpose related to finding guilt or innocence. For the reasons which I shall discuss, I do not find in these two arguments support for the decision. Nor am I persuaded by its cautionary attitude toward this procedure. I recognize that the criteria for decision



in procedural due process cases are necessarily drawn from the traditional jurisprudential attitudes of our legal system rather than from a relatively specific constitutional command. However, this Court has long recognized the central importance of courtroom procedures in maintaining our constitutional liberties. As Mr. Justice Frankfurter often reminded us, the history of individual liberty is largely coincident with the history of observance of procedural safeguards, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, concurring opinion of Frankfurter, J., 341 U. S., at 164.

It seems to me that the use of prior convictions evidence in these cases is fundamentally at odds with traditional notions of due process, not because this procedure is not the nicest resolution of conflicting but legitimate interests of the State and the accused, but because it needlessly prejudices the accused without advancing any legitimate interest of the State. If I am wrong in thinking that the introduction of prior convictions evidence serves no valid purpose I am not alone, for the Court never states what interest of the State is advanced by this procedure. And this failure, in my view, undermines the logic of the Court's opinion.

There is much said about the valid purpose of enhanced punishment for repeating offenders, with which I agree, and about the variety of occasions in criminal trials in which prior crimes evidence is admitted as having some relevance to the question of guilt or innocence. But I cannot find support for this procedure in either the purposes of recidivist statutes or by analogy to the traditional occasions where prior crimes evidence is admitted. And the Court never faces up to the problem of trying to justify this recidivist procedure on the grounds that the State would not violate due process if it used prior convictions simply as evidence of guilt because it showed criminal propensity.

Recidivist statutes have never been thought to allow the State to show probability of guilt because of prior convictions. Their justification is only that a defendant's prior crimes should lead to enhanced punishment for any subsequent offenses. Recidivist statutes embody four traditional rationales for imposing penal sanctions.<sup>1</sup> A man's prior crimes are thought to aggravate his guilt for subsequent crimes, and thus greater than usual retribution is warranted. Similarly, the policies of insulating society from persons whose past conduct indicates their propensity to criminal behavior, of providing deterrence from future crime, and of rehabilitating criminals are all theoretically served by enhanced punishment according to recidivist statutes. None of these four traditional justifications for recidivist statutes are related in any way to the burden of proof to which the State is put to prove that a crime has currently been committed by the alleged recidivist. The fact of prior convictions is not intended by recidivist statutes to make it any easier for the State to prove the commission of a subsequent crime. The State does not argue in these cases that its statutes are, or constitutionally could be, intended to allow the prosecutor to introduce prior convictions to show the accused's criminal disposition. But the Court's opinion seems to accept, without discussion, that this use of prior crimes evidence would be consistent with due process.

The amended Texas procedure is the nearest demonstration that none of the interests served by recidivist statutes is advanced by presentation of prior crimes evidence before the defendant has been found guilty. Under current statutory law,<sup>2</sup> effective since January 1, 1966,

<sup>1</sup> See generally, Note, Recidivist Procedures, 40 N. Y. U. L. Rev. 332 (1960).

<sup>2</sup> Texas Penal Code, Art. 36.01, effective January 1, 1966. The new two-page procedure does not apply in capital cases, the reason for the distinction apparently being because in capital cases the

and therefore not involved in these cases, in felony cases the jury first decides the question of guilt or innocence of the crime currently charged, and only after the defendant is found guilty of the current crime is evidence presented on the entirely separate question of whether the defendant has been previously convicted of a crime which places him within the scope of a recidivist statute requiring enhanced punishment. Under the old Texas procedure involved in these cases, just as under the new procedures, the fact of prior convictions is relevant only to the question of enhanced punishment. Recidivist statutes have nothing whatever to do with the method by which the State shows that an accused has committed a crime.

Whether or not a State has recidivist statutes on its books, it is well-established that the fact of prior crimes may not be used by the State to show that the accused has a criminal disposition and that the probability that he committed the crime currently charged is increased.<sup>2</sup> While this Court has never held that the use of prior convictions to show nothing more than a disposition to

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jury has a choice of punishment under the applicable recidivist statute. The validity of this distinction will be discussed below.

<sup>2</sup> Professor McCormick states:

"The rule is that the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character." McCormick, Evidence § 157 (1954).

Dean Wigmore agrees with this statement of the general rule of exclusion, Wigmore, Evidence §§ 193-194 (1940). As Wigmore points out, evidence of prior crimes is objectionable not because it is not somewhat probative, but because the jury is likely to give it more weight than it deserves and might decide that the defendant deserves to be punished because of the past crime without regard to whether he is guilty of the crime currently charged.

commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts,\*

\*See, e. g., *Marshall v. United States*, 360 U. S. 310 (1959); *Michelson v. United States*, 335 U. S. 469 (1948); *Boyd v. United States*, 142 U. S. 450 (1892).

In *Michelson*, the Court stated:

"Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U. S. 559, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." 335 U. S., at 475-476.

In *Marshall*, the Court reversed a conviction where it was shown that newspaper accounts of the defendant's prior convictions had been seen by a substantial number of jurors. The Court stated:

"... We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence." 360 U. S., at 312-313.

In *Boyd*, the defendant was charged with murder following an attempt to rob, and the prosecution introduced evidence that the defendant had committed other robberies before the one involved in the crime charged. The Court, in an opinion by the first Mr. Justice Harlan, held the evidence of other crimes inadmissible:

"... Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of



as well as decisions by courts of appeals\* and of state courts,\* suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause. Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged.

Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death." 142 U. S., at 458.

\* See, e. g., *Lovely v. United States*, 169 F. 2d 386, 389 (C. A. 4th Cir. 1948):

"The rule which thus forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except in so far as they may establish a criminal tendency on the part of the accused, is not a mere technical rule of law. It arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence. If such evidence were allowed, not only would the time of courts be wasted in the trial of collateral issues, but persons accused of crime would be greatly prejudiced before juries and would be otherwise embarrassed in presenting their defenses on the issues really on trial."

*Railton v. United States*, 127 F. 2d 691, 693 (C. A. 5th Cir. 1948):

"... It is logical to conclude, and very apt to be concluded, that because a man was dishonest once he will steal again. It is certainly 'more probable' that a crooked official did steal than if he were an upright one. Yet our law forbids these very premises. It cannot be shown that the accused has committed other similar crimes to show that it is probable he committed the one charged."

Cf. also *Tedesco v. United States*, 118 F. 2d 737 (C. A. 9th Cir. 1941); *Swann v. United States*, 195 F. 2d 689 (C. A. 4th Cir. 1952); *United States v. Incangelo*, 281 F. 2d 574 (C. A. 3d Cir. 1960).

\* Texas recognizes this general rule, *Seay v. State*, 395 S. W. 2d 40. Other typical decisions are *People v. Molineaux*, 168 N. Y. 284, 61 N. E. 286 (1901); *State v. Scott*, 111 Utah 9, 175 P. 2d 1016 (1947). See also *State v. Myrick*, 181 Kan. 1056, 317 P. 2d 485 (1957); *Scarborough v. State*, 204 Miss. 487, 37 So. 2d 748 (1948).



A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a "bad man," without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, "the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulwitch v. United States*, 336 U. S. 440, 453 (1949). *United States v. Banmiller*, 310 F. 2d 720, 725 (C. A. 3d Cir. 1962). Mr. Justice Jackson's assessment has received support from the most ambitious empirical study of jury behavior that has been attempted, see Kalven and Zeisel, *The American Jury*, pp. 127-130, 177-180.

Recognition of the prejudicial effect of prior convictions evidence has traditionally been related to the requirement of our criminal law that the State prove beyond a reasonable doubt the commission of a specific criminal act. It is surely engrained in our jurisprudence that an accused's reputation or criminal disposition is no basis for penal sanctions. Because of the possibility that the generality of the jury's verdict might mask a finding of guilt based on an accused's past crimes or unsavory reputation, state and federal courts have consistently refused to admit evidence of past crimes except in circumstances where it tends to prove something other than general criminal disposition.

As I have stated, I do not understand the opinion to assert that this Court would find consistent with due process the admission of prior crimes evidence for no purpose other than what probative value it has bearing on an accused's disposition to commit a crime currently charged. It ignores this issue, and points out that evi-

dence of prior crimes in other contexts has not been thought so prejudicial that it cannot be admitted to serve a particular valid purpose. Thus, past crimes may be used to show a common design between a past crime and one currently charged, to show the distinctive handiwork of the defendant, or to show that the act presently at issue was probably not unintentional.<sup>1</sup> We need not disagree with the admission of prior convictions in cases such as these, because past convictions are directly relevant to the question of guilt or innocence of the crime currently charged. They are admitted because their probative value, going to elements of the current charges, is so strong that it outweighs the prejudice inherent in evidence of prior crimes. Also, as the Court further points out, evidence of prior crimes has traditionally been admitted to either impeach the defendant's credibility when he testifies in his own behalf, or to counteract evidence introduced by the defendant as to his good character. In each of these situations, the possibility of prejudice resulting from the evidence of prior convictions is thought to be outweighed by the legitimate purposes served by the evidence. When a defendant attempts to convince the jury of his innocence by showing them that he is a person of such character that it is unlikely that he committed the crime charged, the State has a legitimate interest in counteracting this evidence of good character by showing that the accused has been previously convicted. The defendant has initiated the inquiry into his reputation, and the State should be allowed to respond to this general character evidence as best it can.

Similarly, when prior convictions are introduced to impeach the credibility of a defendant who testifies, a specific purpose is thought to be served. The theory is

<sup>1</sup> See generally, exceptions set out in *McCormick* §157.

that the State should be permitted to show that the defendant-witness' credibility is qualified by his past record of delinquent behavior. In other words, the defendant is put to the same credibility test as any other witness. A defendant has some control over the State's opportunity to introduce this evidence in that he may decide whether or not to take the stand. Moreover, the jury hears of the prior convictions following a defendant's testimony, and it may be thought that this trial context combined with the usual limiting instruction results in the jury's actually behaving in accordance with the theory of limiting instructions: that is, that the prior convictions are only taken into account in assessing the defendant's credibility.

Although the theory by which admission of prior convictions to impeach a defendant's credibility has been criticized,<sup>\*</sup> all that is necessary for purposes of deciding this case is to accept its theoretical justification and to note the basic difference between it and the Texas recidivist procedure. In the case of impeachment, as in all the examples cited by the Court, the prior convictions are considered probative for a limited purpose which is relevant to the jury's finding of guilt or innocence. This purpose is, of course, completely different from the purpose for which prior convictions are admitted in recidivist cases, where there is no connection between the evidence and guilt or innocence.

In all the situations pointed out by the Court, the admission of prior crimes evidence rests on a conclusion that the probative value of the evidence outweighs the conceded possibility of prejudice. There is no middle position between the alternatives of admission or exclusion because, if the evidence is to serve the purpose for

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<sup>\*</sup> See, e. g., Comment, Other Crimes Evidence At Trial: Of Balancing And Other Matters, 70 Yale L. J. 763 (1961).

which it is considered probative, it must be admitted before the jury decides whether the defendant is guilty or innocent. The problem thus becomes the delicate one of balancing probative value against the possibility of prejudice, and the result for most state and federal courts (including this Court in the exercise of its supervisory power over proceedings in federal courts) has been that the trial judge is given discretion to draw the balance in the context of the trial. In view of this uniform tradition, it is apparent that prior convictions introduced for certain specific purposes relating to the determination of guilt or innocence, other than to show a general criminal disposition, would not violate the Due Process Clause.

From these situations where the probative value of prior convictions evidence is thought to outweigh its prejudicial impact, the Court draws the legitimate conclusion that prior convictions evidence is not so inherently prejudicial that its admission is invariably prohibited. It combines this premise with the concededly valid purpose of recidivist statutes to produce the following logic: since prior crimes evidence may be admitted at the guilt phase of a trial where the admission serves a valid purpose and since the purpose of recidivist statutes is valid, prior crimes may be proven in the course of the guilt phase of a trial in order that the jury may also assess whether a defendant, if found guilty, should be sentenced to an enhanced punishment under recidivist statutes. I believe this syllogism is plausible only on the surface, because the Court's premises do not combine to justify its far-reaching result. I believe the Court has fallen into the logical fallacy sometimes known as the fallacy of the undistributed middle, because it has failed to examine the supposedly shared principle between admission of prior crimes related to guilt and admission in connection with



recidivist statutes.\* That the admission in both situations may serve a valid purpose does not demonstrate that the former practice justifies the latter any more than the fact that men and dogs are animals means that men and dogs are the same in all respects.

Unlike the purpose for the admission of prior convictions evidence in all the examples cited by the Court, the admission in connection with enhancing punishment for repeating offenders has nothing whatever to do with the question of guilt or innocence of the crime currently charged. Because of the complete irrelevance of prior convictions to the question of guilt or innocence, the recidivist situation is not one where the trial courts are called upon to balance the probative value of prior convictions against their prejudicial impact. The purpose of admitting prior convictions should be served and prejudice completely avoided by the simple expedient of a procedure which reflects the exclusive relevance of recidivist statutes to the issue of proper punishment. Only after a defendant has been found guilty does the question of whether he fits the recidivist category become relevant to the sentence, and any issue of fact as to his prior convictions should then be decided by the jury.

The availability of this procedural alternative, through which the interests of the State as reflected in its recidivist statutes can be fully effectuated while prejudice to the defendant is avoided, means that the only interest the State may offset against the possibility of prejudice to justify introducing evidence of prior crimes in these cases is the inconvenience which would result from postponing a determination that the defendant falls within a recidivist category until after the jury has found him guilty of the crime currently charged. However, for the purpose of deciding these cases, it is not necessary to

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\* See Stebbing, *A Modern Introduction to Logic*, p. 88 (1948).



consider whether the State's convenience in not conducting a two-stage trial justifies the prejudice which ensues when prior convictions are presented to a jury before it has decided whether the defendant is guilty of the crime charged. For the fact is that Texas has not even this matter of convenience in the method used to find facts regarding prior convictions to balance against the prejudice which ensues from the admission of this prior convictions evidence. In No. 68, *Spencer v. Texas*, the defendant offered to stipulate to the truth of that portion of the indictment which alleged that he had been previously convicted of a crime which put him within the scope of a recidivist statute. The prosecutor refused to accept this stipulation, and the Texas courts allowed proof of the prior conviction to be presented to the jury on the ground that, under the recidivist statute dealing with capital crimes, the jury has a choice between the death penalty and life imprisonment. The courts reasoned that the existence of the prior conviction was information which the jury would find relevant in determining sentence. Of course, the offered stipulation dispensed completely with the need for the State to have the fact of prior crimes found by the jury to determine whether a recidivist statute applied to the defendant. Instead, the State tries to justify the refusal to accept the stipulation on the ground that it was relevant to the jury's discretion in ordering the death penalty. But this rationale would justify letting the jury hear, before determining guilt or innocence, all kinds of evidence which might be relevant to sentencing but which has traditionally been considered extremely prejudicial if admitted during the guilt phase of a trial. Thus, this argument would justify admitting probation reports, all kinds of hearsay evidence about the defendant's past, medical and psychiatric reports, and virtually anything else which might seem relevant to the broad discretion exercised in sentencing. The Court

evidently believes that it is consistent with due process for a State to introduce evidence of a kind traditionally considered prejudicial which is relevant only to sentencing discretion in a single-stage trial before a finding of guilt. This seems to me the only possible grounds for affirming No. 68, since it is obvious that the offer of stipulation removes the need for a finding of fact as to the prior conviction in connection with the recidivist statute.

I would reverse No. 68 and remand for a new trial. For me, the State's refusal to accept the stipulation removes any vestige of legitimate interest it might have to balance against the prejudice to the accused. To nevertheless admit the evidence seems to me entirely inconsistent with the way evidence of prior convictions is traditionally handled in our legal system.

What I have said about the State's lack of interest in introducing this evidence when the defendant tries to stipulate to the prior conviction seems to me to apply equally to defendants under the Texas procedure who were not offered the opportunity of stipulating to their prior convictions. Because of the unclear state of the law in Texas as to the right to have such a stipulation accepted, the failure of a defendant to volunteer a stipulation cannot be interpreted as indicative of what would have happened if the State made stipulation a right. The Texas Court of Criminal Appeals approved a stipulation procedure for felony cases in *Pitcock v. Texas*, 367 S. W. 2d 864 (1963), on the convincing ground that, because the recidivist statutes in felony cases provided for automatic sentencing, a stipulation resolved all issues for which the prior convictions were relevant. As the court put it: "[t]o allow its introduction, after such stipulation, resolves no issue and may result in prejudice to the accused." 367 S. W. 2d, at 865. However, two later cases held that refusal by the prosecutor to accept a stipulation, and the introduction of evidence to the jury

of prior convictions over an offer of stipulation, was not reversible error. See *Sims v. Texas*, 388 S. W. 2d 714 (1965); *Ross v. Texas*, 401 S. W. 2d 844 (1966). Thus, the Texas courts reduced the stipulation procedure to an admonition to the prosecutor, and allowed refusal of the stipulation even though in felony cases the only conceivable reason the prosecutor could have for refusing was to have the benefit of the prejudicial impact of presenting prior convictions to the jury.

Because the stipulation procedure had become merely a matter of prosecutorial discretion, the petitioners in Nos. 69 and 70 cannot be said to have waived any right to stipulate their prior convictions, and it seems to me that, in the absence of a stipulation right, they must be regarded in the same light as the petitioner in No. 68, whose offer of stipulation was refused. If a defendant's offer of stipulation removes any legitimate interest the State might otherwise have in presenting prior convictions to the jury for recidivist purposes, and makes the introduction inconsistent with due process, then it seems to me that the protection of the Due Process Clause should not be limited according to whether a defendant actually explored the chance that a prosecutor might accept an offer of stipulation. Since a stipulation procedure would completely effectuate the minimal state interest in having facts found under its recidivist statutes without the inconvenience of a two-part trial, while at the same time offering a defendant the chance to prevent the possibility of prejudice, it seems to me that due process requires this safeguard.

If the admission of prior convictions solely for the purpose of enhancing punishment in the event a defendant is found guilty violates due process when the defendant is not given the right of admitting the prior convictions to prevent their admission, petitioners' convictions in Nos. 68 and 69 must be reversed. No. 70, however,

raises the question of whether a decision that the old Texas procedure violates due process should be retroactively applied to convictions which are final but which are collaterally attacked in the federal courts by habeas corpus. Considerations of fundamental fairness have led to the opening of final judgments in criminal cases when it has appeared that a conviction was achieved in violation of basic constitutional standards. Thus, in the decisions which have been applied retroactively, *Gideon v. Wainwright*, 372 U. S. 335 (1963); *Douglas v. California*, 372 U. S. 353 (1963); *Griffin v. Illinois*, 351 U. S. 12 (1956); and *Jackson v. Denno*, 378 U. S. 368 (1964), the Court concluded that the constitutional error perceived undermined "the very integrity of the fact-finding process," *Linkletter v. Walker*, 381 U. S. 618, 639 (1965) and the fundamental fairness of the resulting conviction. On the other hand, our decisions in *Linkletter* and *Tehan v. Shott*, 382 U. S. 406 (1966), demonstrate that practices found to violate the Due Process Clause of the Fourteenth Amendment need not necessarily be applied to final convictions. The factors adverted to in those cases for determining whether a constitutional decision should be applied to final cases were the State's reliance on the conduct newly found unconstitutional, whether the purpose of the new rule would be served by fully retroactive effect, and the effect of retroactivity on the administration of justice.

In my view, these factors justify limiting the application of the decision I propose to nonfinal convictions. Texas came to rely on the constitutionality of the procedure involved in these cases by this Court's consistent failure to review the practice until the grant of certiorari in these cases. Moreover, there can be no doubt but that application of this rule to final convictions would seriously disrupt the administration of criminal law in Texas as well as the other States which



have employed a similar procedure in recidivist cases. Cf. *Johnson v. New Jersey*, 384 U. S. 719 (1966). Thus, the question becomes whether the procedure which I would hold unconstitutional infected every proceeding of which it was a part with the clear danger of convicting the innocent. See *Tehan v. Shott*, *supra*. It seems to me that the prejudicial impact of the Texas procedure is not so great as to justify application to final cases.

In all the cases which have been retroactively applied, the judgment was made that the procedure found erroneous went to the heart of the fairness of the conviction and raised the danger of convicting the innocent. Thus, in *Gideon* and *Douglas*, the Court concluded that failure of an indigent defendant to be represented by counsel at trial and on appeal negated the possibility of a fair adversary proceeding. Similarly, the rule of *Griffin v. Illinois* was retroactively applied because forcing an indigent to forgo a meaningful appeal because he could not pay for a transcript meant that the availability of a basic part of the State's system for determining guilt or innocence was conditioned on financial resources. This procedure was an obvious and fundamental denial of fairness in the process leading to conviction. In the final area where new rulings have been retroactively applied, *Jackson v. Denno*, the prejudice to the defendant was that he was not assured of a fair procedure in determining the voluntariness of his confession, and, moreover, that a jury might take into account a confession which it believed to be coerced in determining the defendant's guilt. Obviously, the prejudice which results from the jury learning of such a confession which is obtained unconstitutionally goes directly to the heart of the finding of guilt, and because one reason the Constitution has been held to outlaw involuntary confessions is their unreliability, *Brown v. Mississippi*, 297 U. S. 278 (1936), for other reasons see *e. g.*, *Rogers v. Richmond*, 365 U. S. 534



(1961); *Culombe v. Connecticut*, 367 U. S. 568 (1961), the procedure held unconstitutional in *Jackson* involved a danger of convicting the innocent.

In contrast to the unconstitutional procedures involved in the cases discussed above, the admission of prior convictions in connection with a recidivist statute does not seem to me to justify reversal of final convictions. The fact that prior convictions have been traditionally admitted when they are related to guilt or innocence suggests that their prejudice has not been thought so great as to undermine "the very integrity of the fact-finding process" and to "involve a clear danger of convicting the innocent." See *Linkletter v. Walker*, 381 U. S., at 639; *Tehan v. Shott*, 382 U. S., at 416. Consequently, I would not apply a decision in line with this dissent to final convictions, such as No. 70, a habeas corpus proceeding.

The decision I propose is consistent with a large body of judicial thought. Two United States Courts of Appeals have adopted the view that recidivist procedures which authorize admission of prior convictions evidence before the jury determines that the defendant is guilty is a violation of due-process. In *Lane v. Ward*, 320 F. 2d 179 (C. A. 4th Cir. 1963), the court reasoned that "it is patent that jurors would be likely to find a man guilty of a narcotics violation more readily if aware that he has had prior illegal association with narcotics . . . . Such a prejudice would clearly violate the standards of impartiality required for a fair trial." 320 F. 2d, at 185. In the same vein, the Third Circuit, in *United States v. Banmiller*, 310 F. 2d 720 (1962), reasoned that a procedure like the one involved in the three cases at bar would cause the jury to have in mind the defendant's previous convictions in determining his guilt of the crime currently charged. Both these courts, in fact, go farther than I would, in that they applied their decisions to final convictions. In England, the prejudice which results

from proof of prior crimes before a finding of guilt has been recognized for more than a century, and the rule has been that the fact of prior crimes is found in a separate hearing after the finding of guilt.<sup>10</sup>

The majority of States have adopted procedures which cure the prejudice inherent in the procedure in the cases at bar. In all, some 30 States have recidivist procedures which postpone the introduction of prior convictions until after the jury has found the defendant guilty of the crime currently charged.<sup>11</sup> And at least three others

<sup>10</sup> Coinage Offenses Act, 1861, 24 & 25 Vict., c. 99; Act of 6 & 7 Wm. IV, c. 111; *Reg. v. Shuttleworth*, 3 Car. & K. 375.

<sup>11</sup> The States which have adopted a procedure either by legislation or judicial decision which separates the determination of prior convictions from the determination of guilt of the crime currently charged are: Alaska, Alaska Stat. § 12.55.060 (1962); Arkansas, *Miller v. State*, 394 S. W. 2d 601 (1965); Colorado, *Heinze v. State*, 253 P. 2d 886 (1953); Connecticut, *State v. Ferrone*, 113 A. 452 (1921); Delaware, Del. Code Ann., Tit. 11, § 3912 (b) (Supp. 1964); Florida, Fla. Stat. Ann. § 775.11 (1944); *Shargaa v. State*, 102 So. 2d 814 (1958); Idaho, *State v. Johnson*, 383 P. 2d 326 (1963); Kansas, Kans. Gen. Stat. Ann. § 21-107 (a) (1949); Louisiana, La. Rev. Stat. Ann. § 15.529.1 (D) (Supp. 1964); Maryland, Md. Rule of Proc. 713; Michigan, Mich. Stat. Ann. § 28.1085 (1954); Minnesota, Minn. Stat. Ann. § 609.19; Missouri, Mo. Stat. Ann. § 556.280; Nebraska, Nebr. Rev. Stat. § 29-2221; New York, N. Y. Penal Law § 1943; New Mexico, *Johnson v. Cor*, 380 P. 2d 199 (1963); North Dakota, N. D. Cent. Code § 13-06-23 (1960); Ohio, Ohio Rev. Code Ann. § 2961.13 (1954); Oklahoma, Okla. Stat. Ann., Tit. 22, § 860 (Supp. 1964), *Harris v. State*, 389 P. 2d 187 (1962); Oregon, Ore. Rev. Stat. § 168.065 (Supp. 1963); Pennsylvania, Pa. Stat. Ann., Tit. 18, § 5108 (1963); South Dakota, S. D. Code § 13.0611 (3) (1939); Texas, Texas Penal Code, Art. 36.01 (1966); Tennessee, Tenn. Code Ann. § 40-2901, *Harrison v. State*, 394 S. W. 2d 713 (1965); Utah, Utah Code Ann. § 76-1-19, *State v. Stewart*, 171 P. 2d 383 (1946); Virginia, Code of Va. § 53-296 (1958); Washington, *State v. Kirkpatrick*, 43 P. 2d 44 (1935); West Virginia, W. Va. Code Ann. § 6131 (1961). In addition to these 28 States, two States take prior convictions into account in the determination

have substantially mitigated the prejudice of the single-stage recidivist procedure by affording the defendant the right to stipulate to his prior crimes to prevent their introduction at the trial.<sup>12</sup> Thus, only 17 States still maintain the needlessly prejudicial procedure exemplified in these three cases. The decision I propose would require only a small number of States to make a relatively minor adjustment in their criminal procedure to avoid the manifest unfairness and prejudice which has already been eliminated in England and in 33 of the United States.

I would reverse the convictions in Nos. 68 and 69 and remand for a new trial. In No. 70, I would affirm this final conviction.

George J. Beta, Director  
Texas Department of  
Corrections.

(January 23, 1967)

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I join the dissenting opinion of THE CHIEF JUSTICE insofar as that opinion would reverse in Nos. 68 and 69. I would affirm the conviction in No. 70. It seems to

of when a convict is eligible for parole, and entrust the fact-finding determination to parole boards: Mississippi, Miss. Code Ann. § 4004-04 (Supp. 1962), as amended, Miss. Laws 1964, c. 366; New Jersey, N. J. Stat. Ann. § 30.4-123.12 (1964), N. J. Stat. Ann. § 2A:85-13 (Supp. 1964). Thus, 30 States in all have adopted wholly nonprejudicial procedures in connection with their recidivist statutes.

<sup>12</sup> The three States which have adopted a stipulation procedure are: California, Cal. Penal Code § 1025, *People v. Hobbs*, 98 P. 2d 775; Arizona, Ariz. Rule Crim. Proc. 180, Ariz. Code Ann. § 44-1004, *Montgomery v. Eymann*, 391 P. 2d 915 (1964); and Wisconsin, *State v. Meyer*, 46 N. W. 2d 341 (1951).

**SUPREME COURT OF THE UNITED STATES**

Nos. 68, 69, AND 70.—OCTOBER TERM, 1966.

Leon Spencer, Appellant,  
68                    v.                    On Appeal From the Court of  
                         State of Texas.           Criminal Appeals of Texas.

69 Robert A. Bell, Jr.,  
Petitioner,  
v.  
State of Texas.

On Writ of Certiorari to the  
Court of Criminal Appeals  
of Texas.

William Everett Reed,  
Petitioner,  
70 v.  
George J. Beto, Director,  
Texas Department of  
Corrections.

On Writ of Certiorari to the  
United States Court of Ap-  
peals for the Fifth Circuit.

[January 23, 1967.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I join the dissenting opinion of THE CHIEF JUSTICE insofar as that opinion would reverse in Nos. 68 and 69. I would, however, also reverse in No. 70. It seems to me that the constitutional error here involved undermined "the very integrity of the fact-finding process," *Linkletter v. Walker*, 381 U. S. 618, 639, and I would therefore apply the rule retroactively. *Gideon v. Wainwright*, 372 U. S. 335; *Douglas v. California*, 372 U. S. 353; *Griffin v. Illinois*, 351 U. S. 12; *Jackson v. Denno*, 378 U. S. 368.